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82-689
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

HOMER N. COMEAU, ET UX.,
Petitioners,

vs.

CITY OF BROOKSIDE VILLAGE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

1. Whether the ordinances of the City of Brookside prohibiting the location of manufactured housing on any site other than "mobile home parks" deprives Petitioners of the Fourteenth Amendment's right to acquire, enjoy, own and dispose of property.

2. Whether Ordinance No. 58 of the City of Brookside deprives Petitioners of due process and equal protection of the Fourteenth Amendment in that it does not bear a substantial relationship to public health, safety or general welfare but rather is arbitrary, unreasonable and irrationale.

3. Whether the National Manufactured Housing Construction and Safety Standards Act, 42 USC §5403 preempts state regulation of manufactured housing with respect to the construction and installation of manufactured housing.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Homer N. Comeau, et ux, through the undersigned attorney, petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Texas Supreme Court is attached as App. A. The decision of the Texas Court of Civil Appeals is attached as App. B. The order overruling Petitioners' Motion for Rehearing is attached as App. C. The opinion of the state district court is not reported.

JURISDICTION

The judgment of the Texas Supreme Court (App. B) was entered on May 19, 1982. A petition for rehearing was denied on June 30, 1982 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The opinion of the Supreme Court of Texas considered discussed and denied the questions raised herein b petitioners.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. §5403(d) provides

in relevant part:

> "Whenever a Federal mobile home construction and safety standard established under this title is in effect, no State or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any mobile home covered, any standard regarding construction or safety applicable to the same aspect of performance of such mobile home which is not identical to the Federal mobile home construction and safety standard." 42 U.S.C. §5403(d)(1974).

The Texas Manufactured Housing Standards Act states:

> "A political subdivision of this state, without the express approval of the department following a hearing on the matter, may not adopt different standards from those promulgated by the department for the construction or installation of manufactured housing within the political subdivision." TEX.REV.CIV. STAT.ANN. art. 5221f, (Supp. 1981).

STATEMENT

The Constitutionality of two ordinances of the City of Brookside Village are presented herein. Petitioners

own a four (4) acre lot in City of Brookside Village on which a store, icehouse and storage sheds are located. In July 1978, Petitioners made request to the city council that they be allowed to move a manufactured house on the premises to be used as their residence. This request was refused by the city council on the basis of City Ordinances 58 and 78 which define mobile homes and prohibit their use as a residence outside of a "mobile home park". These ordinances are the City's only zoning provisions, i.e., there is no comprehensive zoning plan but rather this single, isolated incident of spot zoning. The body of this writ reports the reasons advanced by the City to justify these ordinances.

REASONS FOR GRANTING THE PETITION

1. This is not a zoning case. It is not a case where the proposed use is less than the "highest and best". No contention has been raised that the property cannot be used for a single family residence. This is a simple case of discriminatory state action, under the guise of zoning, directed against citizens who purchase manufactured housing. The *use* of the land is not changed merely because the Petitioners have chosen a manufactured, single family home rather than one built on site. This is a situation where citizens who purchased homes constructed under stringent, federal regulations are being denied the right to reside in the area of their choice for no valid reason. This represents the imposition of the long disgraced reasoning of the "separate but equal" theory to federally protected rights of

citizens to acquire, enjoy, own and dispose of property. This case involves the denial, by state action, of a citizen's ability to place a manufactured home on a particular lot *only* because it is a manufactured home. To place the matter in context, a brief history of manufactured history is provided.

The "trailer houses" of the 1930's and 1940's were the forerunners of today's manufactured homes. These trailer houses were often used by transient workers and were frequently placed in overcrowded, poorly maintained camps. In 1940, the Bureau of the Census categorized trailer houses with railroad cars, tents and shacks as a category of housing. Although these units provided much needed housing for defense and military construction workers during World War II, the owners and occupants were sometimes referred to as "trailer trash". In the 1960's, the evolution continued, and many of these dwellings became known as "mobile homes" because of their large size and more permanent use. The 1970 census noted that mobile homes had become a significant part of the nation's housing. In 1974, Congress passed the National Mobile Home Construction and Safety Standards Act, and on June 15, 1976, the Department of Housing and Urban Development began enforcement of a mandatory federal building code for the construction of mobile homes. This Act preempted state and local regulation of mobile home construction by prohibiting any standards which were not identical to those promulgated by HUD. By 1980, mobile homes had evolved into dwellings which ranged in size from 400 to 2,000 square

feet and were being constructed in one, two and three sections, many of which were being permanently attached to realty. In recognition of these facts and that a very small percentage of mobile homes were ever moved from their original homesite, Congress changed the statutory name to "manufactured homes".

Modern manufactured housing is available in a wide range of sizes, colors, styles and prices. All possible amminities are available just as in site-built structures. The same kinds and types of conventional mortgage financing are also available for manufactured homes.

The evolution of the industry, however, has not been matched by public perception. Attitudes formed decades ago about "trailer houses" persist today. As a result, manufactured housing often is zoned into "trailer parks" or "mobile home parks" and prohibited within all other residential areas.

The preamble of the Fair Housing Act of 1968 provides:

> "It is the policy of the United States to provide, within constitutional limitations, for fair housing through the United States."

The National Manufactured Home Construction and Safety Standards Act provides a stringent building code to insure the structural integrity of manufactured housing.

These congressional mandates for fair housing practices and quality construction of manufactured housing provide little assistance to those families who, fortunate enough to be able to realize the American dream, find themselves zoned out of traditional

residential areas and neighborhoods, and relocated to "mobile home parks" simply because the shelter they choose, or can afford, is manufactured housing. Federal building codes insure equality of construction between site built homes and manufactured housing, and to permit states' to treat the latter differently simply because it is constructed in a factory away from the homesite and has, to some, an antiquated stigma, requires the reasoning of *Plessy v. Ferguson*, 163 U.S. 537, 16 Sup.Ct. 1138, 41 L.Ed. 256 (1896) where the Court discussed the "separate but equal" theory in this manner:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and

that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals . . ."

The ordinance of the City of Brookside requiring manufactured housing to be placed only in "mobile home parks" is suspect for the same reasons *Plessy*, supra, was discredited in *Brown v. Board of Education*, 347 U.S. 483, 74 Sup.Ct. 868, 98 L.Ed. 873 (1954). To argue that the purchase of the manufactured housing was the choice which decided the location in which one would reside is to adopt the *Plessy*, supra, position that the badge of inferiority following from enforced separation existed solely because the colored race choose to place that construction upon it.

The *Brown*, supra, considerations concerning the importance of education are no less compelling than those concerning a family's home. The home and the neighborhood are recognized as primary environmental factors affecting young children and have a substantial impact on the emotional and psychological development of the child. A family's choice of neighborhoods may be based on one or more of numerous facts, such as proximity of schools or churches, location in relation

to the office or jobsite, proximity of relatives, nearness of shopping centers, etc. The choice of the neighborhood is, after affordability considerations, the primary decision affecting single family residential purchases.

It is not the position of Petitioner that "mobile home parks" are undesirable or unattractive. Many mobile home parks and communities are attractive, well appointed and offer a superior life style for the residents. However, the residents of mobile home parks are — and will forever remain — tenants, subject to the rules and regulations of the management or ownership which, of course, can change from time to time. It is the position of Petitioner that forcing a family to involuntarily reside in such a park as a result of a manufactured home is violative of the Fourteenth Amendment for the same reasons that "separate but equal" educational opportunities were struck down in *Brown*, supra.

The rationale that the Constitution does not provide a guarantee of access to dwellings of a particular quality, *Lindsey v. Normet*, 405 U.S. 56 (1972) is distinguishable as the instant case deals with the use of a citizen's own property.

2.a. The validity of an ordinance must turn on the circumstances of each case and the character of the regulations involved. Bound by this principle, the facts of this case, as evidenced by the record, must be applied by this Court to the legal issues to determine whether the ordinances are valid and constitutional.

The Court must, therefore, address the issue of whether an ordinance that is not part of a comprehen-

sive zoning plan, but which attempts to exclude all mobile homes except those located on rented or leased space in mobile home parks, bears a *substantial relation* to the public health, safety, morals or general welfare. A statutory discrimination must be based on differences that are reasonably related to the purposes of the act in which it is found. See *Morey v. Doud*, 354 U.S. 457 (1957).

As Petitioners have graphically illustrated hereinabove, there is no evidence in the record to reflect that *any* relationship exists between these ordinances and the protection of the public health, safety, morals or general welfare. The reasons alleged by Respondent's witnesses for the enactment and enforcement of the ordinances, i.e., "concern for lack of sewage, the lack of supply of water, the lack of protection of the fire department" (Louis Boehm, S.F. 51), all fail when applied to the actual facts of the situation existing in Brookside Village. Such "reasons" seem especially unfounded when the evidence reveals that no studies were performed, no experts solicited and no committees formed to review or evaluate the problems prior to the enactment of the ordinances.

The conditions the Respondents seek to remedy in the public interest commonly relate to all types of structures in the community. To discriminate selectively against manufactured homes — against a particular type of construction — under the guise of police power neither cures the alleged problem nor provides equal protection to its citizens.

The City alleges a potential health problem con-

cerning the density of septic tank systems; however, the problem is undisputedly one which involves the density of septic tank installations connected to all structures within the City. Prohibiting manufactured homes has *no* relationship to any solution to the problem; the solution is in regulation of the number of residences, or businesses, which can be constructed or used. In other words, the *type* of structure has no relationship to the septic tank installation as *any* structure would require a septic tank since no city sewer system has been provided.

Further, there are limits on a municipality's exercise of its police power, separate and apart from the substantial relationship test. Certainly, no ordinance can be arbitrary, capricious and/or unreasonable. An ordinance that is based on bias or prejudice must fail this test. The record shows that the City of Brookside Village has only enacted *one* zoning regulation — that being the one in question which excludes mobile homes from being located in the City except in mobile home parks. This Court should recognize how ludicrous this becomes then the City ordinances will allow the Petitioners to place a business or commercial venture (including a high density, high rise apartment complex) on their property, but will not allow them to use that same land for a single family residence — if the residence is a manufactured home. This unconscionable result occurs even though the home is affixed to a permanent foundation, sits on four (4) acres of land, meets all construction, building and safety codes and standards, and provides a safe, durable, single family

home at a moderate price.

Petitioners submit that the City of Brookside Village has acted in an arbitrary, capricious and unreasonable manner in attempting to exclude all mobile homes from being located on privately owned (as opposed to rented or leased) property. This action can only be explained by bias and prejudice.

Petitioners would again point to those cases which have defined the constitutional limits which are placed on a municipality's use of its police power. In *Village of Euclid v. Ambler Realty Co.*, supra, the court stated the issue as follows: "Is the ordinance invalid in that it violates the constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police powers, which are unreasonable and confiscatory'?" *Id.* at 386.

The Supreme Court of Texas in *Spann v. City of Dallas* defined the police power as a grant of authority from the people to the government for the protection of the health, safety and welfare of the public. 235 S.W.2d 513 (Tex. 1921). "The police power is funded in public necessity, and only public necessity can justify its exercise." *Id.* at 515. The Court stated in regard to the validity of such ordinances that:

> "Since the right of the citizen to use his property as he chooses so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers

> or threatens the public health, the public safety, comfort or welfare. A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensating advantages." *Id.* at 515.

The Texas Supreme Court, in *Lombardo v. City of Dallas,* supra, again stated that the police power is subordinate to the right to use property as the owner chooses unless such use endangers the public health, safety, or welfare. Again, Respondents ask the Court, where, after close scrutiny of the facts, is the substantial relation between these ordinances and a valid exercise of the police power?

Of the cases cited in the Court's opinion, only one was directly on point as to the facts and issues germane to this case. In *Robinson Township v. Knoll,* 410 Mich. 293, 302 N.W.2d 146 (1981), the Michigan Supreme Court held that a per se regulation prohibiting mobile homes from residential zones other than mobile home parks is unconstitutional.

The Court framed the issue in the case as follows: "...do mobile homes differ from other single family dwellings in any constitutionally cognizable manner which would justify their per se classification as a different use? If not, then the ordinance limiting mobile

homes to mobile home parks has 'no reasonable basis for its existence'." After examining the same public health, safety moral and welfare considerations present in this case, the Michigan Court held that there was no reasonable basis.

The understanding that the Michigan court had for the circumstances at bar is best stated in the summation of its opinion:

> "This is not to say that a municipality must permit all mobile homes, regardless of size, appearance, quality of manufacture or manner of installation on the site, to be placed wherever site-built single family homes have been built or are permitted to be built. Nor do we hold that a municipality may no longer provide for mobile home parks. We hold only that a per se restriction is invalid; if a particular mobile home is excluded from areas other than mobile home parks, it must be because it fails to satisfy standards designed to assure that the home will compare favorably with other housing that would be allowed on that site, and *not merely because it is a mobile home." (Emphasis added)*

This statement succinctly sets forth the position of Petitioners that their home should be regulated in the same manner as all single family residences.

However, the Supreme Court of Texas has refused to consider *Robinson Township* favorably and has cited other cases as standing for more persuasive authority.

Therefore, this antiquated, prejudicial viewpoint mandates a review of these cases to point out the distinctions.

The cases cited by the Supreme Court of Texas were decisions involving ordinances enacted pursuant to comprehensive zoning plans. Brookside Village, as previously stated, does not have such a plan. Further, virtually all of these cases are pre-1976 and do not, in fact could not, consider the federal mandates involved in the construction of manufactured housing since that date. See *Robinson Township v. Knoll*, supra.

Thus, a review of the only two cases decided after HUD-code regulations went into effect in June 1976 best illustrate the inapplicability of the type of case relied upon by the Supreme Court of Texas as authority. In *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 586 P.2d 860 (1978), the appellate court held, in an appeal from Summary Judgment, that: (1) the findings of fact and conclusions of law entered by the trial court were superfluous and could not be considered; and (2) the Court's review was limited to considering only uncontroverted facts developed by the pleadings or by factual concessions. Thus, no facts were before the Court upon which it could make a decision as to whether there was a substantial relationship between the public health, safety, morals and welfare and the municipality's exercise of its police power.

Even if *Duckworth* could have reached the merits, a major fact differentiates it from the instant case. The City of Bonney Lake had a comprehensive zoning

ordinance and it *did not exclude* all mobile homes. The court in *Duckworth* stated:

> "As with every new use, mobile homes must be provided for. But, any provision made must be by zoning regulations designed to fit the community's *total* need. We are also cognizant that increased mobile home use has developed in a climate of municipal and neighborhood hostility which originally impeded efforts to effect reasonable and rational accommodations between the mobile homes and more conventional residential uses..." (Emphasis added)

Likewise, the case of *Town of Stonewood v. Bell*, 270 S.E.2d 787 (W.Va. 1980), is not valid precedent for application in the instant case. *Town of Stonewood* is an appeal from a summary judgment and is based on the State of West Virginia's enabling statute (W.Va. Code §8-12-5(30)) which grants to every municipality the power "to prohibit with or without zoning the location of occupied house trailers or mobile homes in *certain* (emphasis added) residential areas". *Id*, at 789. Here, the court deferred to the state legislature's action and did not make a determination as to the constitutionality of the ordinance of the municipality.

By analogy, Petitioners point to the Supreme Court of Texas' decision in *Thompson v. City of Palestine*, 501 S.W.2d 579 (Tex. 1974). The Court stated as follows:

> "On the other hand, this court has condemned spot zoning, where a small area is singled out for different treatment from that accorded to similar surrounding land without any showing of justifiable changes in conditions . . . . We do not presume the validity of such spot zoning."

This case illustrates two points. First, a judicial abhorance to "spot zoning"; second, a judicial recognition of "justifiable changes in conditions". The ordinance in the instant case is equally as offensive to the first point as the one in the *Thompson* case, and the Texas Supreme Court in the cause at bar completely fails to recognize the substantial changes which have occurred in the evolution of manufactured housing.

Ordinance No. 78, as amending No. 58, is really not a land "use" regulation as pointed out hereinabove. It is an absolute prohibition of a particular type of structure for an approval use. However, if such were land use regulation, it would of necessity be a defacto zoning ordinance and would fail the "comprehensive" test required by Texas Statutes. The Texas Legislature has delegated "zoning powers" to cities pursuant to the Zoning Enabling Act (TEX.REV.CIV.STAT.ANN. art. 1011a-1011j). Art. 1011c of that statute requires that zoning ordinances *shall* be enacted pursuant to a comprehensive zoning plan (emphasis added). The City of Brookside Village has no comprehensive zoning plan, thus Ordinance No. 78 is void because in contravention of the specific requirements of this statute.

b. Petitioners have been denied equal protection of law guaranteed by the Texas and Federal Constitutions, and the Texas Supreme Court erred in not striking down the ordinance as applied to Petitioners' single family residence.

The instant issue relates to this Court's command that analysis of unconstitutional discrimination must "never be confined to historic notion of equality". *Harper v. Virginia Board of Elections*, 383 U.S. 663 at 669 (1966). Equality issues must be determined with the present and future in mind.

Equal protection requires rationality in the nature of the class singled out. *Rinaldi v. Yeager*, 384 U.S. 305 (1966). "The courts must reach and determine the question whether the classifications drawn . . . are reasonable in light of its purpose . . . " *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). There must be a legitimate public purpose and the means chosen must fit the ends.

The only potential public purpose served by Ordinance No. 78 is to avoid the possible risk of fire in mobile homes constructed prior to the HUD code and possibly to "protect property values". (Petitioners rely on their other points of error and the undisputed record to show that mobile homes have no water or sewage characteristics different from any other residence.)

If the public purpose goal of the ordinance were to decrease fire risks, then an ordinance could have been drawn to fit the goal by (1) requiring substantial spacing between all structures and requiring water wells to have reasonable capacity for firefighting

capability; or (2) prohibiting all residential structures (including mobile homes) unless they met certain required fire prevention standards. As drawn, Ordinance No. 78 totally fails to meet or fulfill such a public purpose goal.

If the goal of the ordinance is to "protect property values", the ordinance could be drawn to fit the goal by (1) requiring minimum lot sizes for all structures with appropriate off-set and set-back requirements; (2) requiring all structures to be built with certain kinds or types of exterior siding materials, roofing, etc.; or (3) developing a comprehensive zoning plan for multiple types of residential, commercial and industrial use areas within the City. Some courts have recognized as a "legitimate function of zoning" the concern of cities wanting to stabilize property values and insure that a pre-existing use does not lose its value by some incompatible use on adjacent property. These cases involved cities which had adopted comprehensive zoning plans, or which had well defined areas of use and development. *Eastlands, Inc. v. Floyd County,* 244 Ga. 761, 262 S.E.2d 51 (1979).

The case at bar is a glaring example of a city that has *no* plan for stabilized property values because it has no zoning plans other than the "single-shot" ordinance before this Court. Petitioners strongly urge that the City of Brookside Village has absolutely no legitimate concern over "protecting property values" in the way it has drawn its one and only zoning ordinance. The record shows that Petitioners' land is already used in a commercial manner with a store and ice house thereon.

Respondents' four acres do not adjoin a settled residential neighborhood of homogenous site built structures. There is virtually no development near Petitioners' land. Petitioners' home is a quality built, federally approved, 3 bedroom, 2 bath home, inspected to assure compliance with federal construction standards, of approximately 1,780 square feet, which is affixed to a permanent foundation, attached to real estate and cared for as any other new home. Petitioners plan to build a two-car garage and porch adjoining the home.

The record contains no evidence that the City of Brookside Village has any stabilized property values to maintain. On the contrary, the record shows that the City of Brookside Village has taken no steps to stabilize property values. Therefore, Ordinance No. 78 wholly fails the equal protection test if "protecting property values" is the alleged public purpose goal. The means chosen do not fit the ends. There is no stable community, no thought out plan, no established property values to protect.

Just as it is well settled that the judiciary will not needlessly infringe upon the legislative functions of government, it is also well settled that legislation which burdens fundamental rights or suggests prejudice will be subject to strict scrutiny by the courts. As Justice Stone state in *United States v. Carolene Products Co.*:

> ". . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of

> those political processes ordinarily to be relied upon to protect minorities, and which may be a call for a correspondingly more searching judicial inquiry . . . ." 304 U.S. 144 at 152-53 n.4 (1938).

A court that is too timid to draw a realistic line of demarcation between the legislative and judicial functions abdicates its role as defender of the Constitution, and therefore unleashes the will of the majority upon the poor, the unpopular, the minority and the less fortunate.

A review of the record shows a strong bias against any mobile home in the mind of the Mayor of the City of Brookside Village as he was quoted in a local paper:

> "If they try to move a mobile home next to my house . . . I'll burn it down and you can quote me on that." (S.F. 43).

This is the same individual who condemned mobile homes as "eyesores" per se but had trouble differentiating between mobile homes and site-built structures in photographs. He also admitted that many site-built homes are eyesores.

Despite "presumptions", "inferences" and "prejudices" which are argued in favor of this Ordinance, this Court's duty is to place this zoning ordinance next to the provisions of the United States Constitution relating to due process and equal protection for analysis. If Ordinance No. 78 as amending Ordinance No. 58, casts a shadow over these applicable Constitutional provi-

sions, this Court must strike down the offensive provisions of the Ordinance.

Petitioners appear before this Court with the request that they be granted equal protection under the law. Professor Laurence H. Tribe states the inherent problem with the following simple notion of equal protection:

> "Neither in theory nor in operation, however, can a norm of equality be given real context without imposing significant constraints upon the substantive choices that political majorities and their representatives might feel strongly inclined to make." *American Constitutional Law* §16-1 (1978).

As the Oregon Supreme Court stated ten years ago:

> "At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life:
>
> It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial,

> or judicial in character. To place them in the hands of legislative bodies . . . is to open the door completely to arbitrary government." *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 at 26 (Wash. 1972).

The Texas Supreme Court abdicated its duty of judicial review when it stated: "An adjudication of t' e appropriate measure of regulation of mobile homes constructed in conformance with federal and state standards is the prerogative of local and state governing bodies." This is an unconscionable position. Local legislatures cannot be allowed to thwart the intent of federal and state legislation in connection with a matter as important to the public interest as safe, durable and affordable housing.

The record shows that the City of Brookside Village made no studies and utilized no engineers or other expert consultants before banning mobile homes from private property locations. Such unreasonable, arbitrary and capricious action is blatant endorsement of majoritarian domination. Ordinances are passed by a majority of the members of City Councils. Members of City Councils are elected by majority vote of the people who reside within the city limits. People cannot reside within the city limits of Brookside Village if they want to place a manufactured home permanently on their own real estate. There is only one mobile home park in Brookside Village. So, the offending ordinance will not change through the local legislative process because the

discrete and insular minority of mobile home owners who want to affix their homes permanently to their own real estate cannot ever vote out the very people whose prejudice create the ordinance under review.

The Texas Supreme Court stated that it is aligning itself with the majority of other jurisdictions in its holding. Petitioners respectfully disagree and suggest that a more accurate analysis of the May 19, 1982 Texas Supreme Court Opinion shows that the Court aligned itself only with the historical prejudices of the past to the detriment of the constitutional guarantees of Petitioners and other similarly situated landowners. The trend since the 1970's has been towards a more realistic view of local governments and the parties in interest, with a shift towards more sophisticated and creative judicial review. N. Williams, Jr., *American Land Planning Law*, Chap. 5 (1974 and 1981 Supp.).

The Texas Supreme Court erred in concluding: "Because all mobile home owners, desiring to use their structures as residences, are treated alike under Ordinance No. 78, no denial of equal protection is present". Petitioners respectfully submit that the Court completely missed any reasonable classification. The Texas Supreme Court's classification begs the question, just as courts prior to *Brown vs. Board of Education*, 347 U.S. 483 (1954) may have reasoned: "Because all black people desiring to ride the bus are treated alike by the ordinance requiring them to sit at the back, no denial of equal protection is present".

Although mobile home owners may not yet be a "suspect classification", this Court should recognize

that they do comprise a "discrete and insular minority" which suffers due to the prejudice of the majority. *United States v. Carolene Products Co.*, supra.

Equal protection guarantees will be hollow and empty if, when left in the hands of the local majority, the judiciary draws its line of judicial deference too narrowly. The proper classification test for an ordinance in a city without a comprehensive zoning plan is whether it treats all landowners alike and only restrict use which, in fact, cause harm to the adjoining property. If this Court feels the record contains facts sufficient to sustain some classification regarding use by mobile homes, let that classification be based on a rational basis (non-HUD-code constructed mobile homes restricted to parks; HUD-code constructed mobile homes on a permanent foundation not so restricted). But the classification should not sentence all mobile home owners to life as a tenant of a mobile home park. The ordinance before the Court is unconstitutional on its face and in its execution as to Petitioners.

3. As the Texas Courts have noted, an ordinance which conflicts or is inconsistent with state legislation is impermissible. *Jere Dairy, Inc. v. City of Mt. Pleasant*, 417 S.W.2d 872 (Tex.Civ.App.-Texarkana 1967, writ ref'd. n.r.e.). However, the Texas Supreme Court obviously felt that the ordinances of Brookside Village were "ancillary to and in harmony with the general scope and purpose of the state enactment", and thus were not pre-empted by the state and federal statutes.

A close examination of the ordinances, as synopsed by their respective preambles, will show they *are* in conflict with state and federal statutes. The preamble to Ordinance No. 58 states:

> "An ordinance of Brookside Village, Texas, for the purpose of regulating the construction, operation and maintenance of mobile home parks in the village of Brookside; requiring a construction permit for the construction, alteration or extension of mobile home parks and providing for inspections and fees; requiring a license for the operation of a mobile home park and providing for inspections and fees; requiring that an annual, a semi-annual or a temporary parking permit be obtained for any mobile home or travel trailer occupying a stand in a mobile home park and providing for inspections and fees; providing for appeals; establishing standards for the construction, operation and maintenance of mobile home parks; providing that owners or operators of existing mobile home parks shall be permitted a period of time as herein provided to operate a mobile home park without obtaining a license; regulating mobile homes and travel trailers outside of mobile home parks; containing a repealing clause and a severability clause; containing a penalty provision and providing an effective date."

and to Ordinance No. 78:

> An ordinance amending Ordinance No. 58; regulating the parking of mobile homes; regulating the change or replacement of mobile homes; providing for emergency use of mobile homes; requiring permits for such emergency use; providing for a penalty for violation hereof; and providing for an effective date hereof."

The stated purposes of both of these ordinances is to regulate the construction, inspection and installation of mobile homes. A review of the state and federal statutes clearly indicates that such regulation is now exclusively within the purview of these bodies politic.

The National Manufactured Housing Construction and Safety Standards Act states:

> "Whenever a Federal mobile home construction and safety standard established under this title is in effect, no State or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any mobile home covered, any standard regarding construction or safety applicable to the same aspect of performance of such mobile home which is not identical to the Federal mobile home construction and safety standard." 42 U.S.C. §5403(d)(1974).

The Texas Manufactured Housing Standards Act states:

> "A political subdivision of this state, without the express approval of the department following a hearing on the matter, may not adopt different standards from those promulgated by the department for the construction or installation of manufactured housing within the political subdivision." TEX.REV.CIV.-STAT.ANN. art. 5221f, (Supp. 1981).

Thus the state and federal governments have pre-empted local municipalities with reference to the public health, safety and welfare as such relate to fire safety, windstorm resistence, and value of the mobile home due to appearance and external siding and roofing materials. The City of Brookside Village is left *only* with the regulation of the connection of the home to local utilities, or to private water and septic systems, and the spacing and density of the homes. All of the alleged public purpose goals of this City have been pre-empted.

Drawing specific attention to the language of the state statute it must be noted that the City of Brookside Village has *never* requested or received permission to vary their standards from those of the State of Texas. (Testimony of Louis Boehm, S.F. 54) The language of both statutes is plain and unequivocal — there can be no variance from the state and federal standards. Surely, the state and federal legislatures did not intend nor contemplate that municipalities could evade the preemption of the construction standards by excluding manufactured housing. The ordinances of Brookside

Village are at variance with these statutes, and therefore, must, by the exact language of both statutes be pre-empted.

It seems only logical that the state and federal governments after years of research, examination, study and public hearings would require a political subdivision such as Brookside Village to conform to their mandates. Cities such as Brookside Village must not be allowed to continue to enforce these discriminatory ordinances, which were enacted with no research and no study, in direct contravention of the express requirements of both legislatures.

To paraphrase the Texas Supreme Court's own citation, a general law and a city ordinance will be held repugnant to each other if no reasonable construction upholding both can be reached. *City of Beaumont v. Jones,* 560 S.W.2d 910, 911 (Tex.Civ.App.-Beaumont 1977, writ ref'd. n.r.e.). In the instant case, the evidence is clear — the alleged purposes and goals for which Ordinance No. 78 were enacted have been pre-empted by the State of Texas and the United States.

CONCLUSION

The Petitioners request that their writ of certiorari should be granted.

Respectfully submitted,

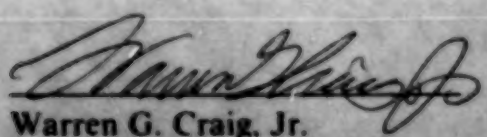
WARREN G. CRAIG, JR.
P. O. Box 896
Austin, Texas 78767
(512) 474-7153
Bar #04987500

ATTORNEY FOR PETITIONER

September 27, 1982

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 1982, a copy of Petitioners' Writ of Certiorari was served on Respondents' counsel, William E. Kuhlmann, 3616 Preston Road, Pasadena, Texas 77505 by depositing same, properly addressed, in a United States Post Office, with first-class postage prepaid.



Warren G. Craig, Jr.

IN THE SUPREME COURT OF TEXAS

CITY OF BROOKSIDE VILLAGE, PETITIONER	
V.	FROM BRAZORIA COUNTY
HOMER N. COMEAU, et ux., RESPONDENTS	FOURTEENTH DISTRICT

This is a suit for permanent injunction, brought by Homer N. Comeau and Hazel A. Comeau, to enjoin the City of Brookside Village from enforcing two ordinances relating to the location of mobile homes and to recover damages. The trial court, without a jury, held the ordinances were valid and constitutional and rendered a take nothing judgment against the Comeaus. The court of civil appeal affirmed the portion of the judgment ordering that the Comeaus take nothing by their suit but reversed and rendered the judgment of the trial court on the issue of the validity of the city's ordinances. 616 S.W. 2d 333.

App. "A"

It held the ordinances unconstitutional, as an unfair restriction on the use of property which served no legitimate state interest.[1] We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

The Comeaus are owners of a four acre lot in Brookside Village, a small "bedroom" community north of Pearland. A store and storage sheds are located on their lot. The Comeaus sought, by application to the city council, permission to place a mobile home on the premises for use as their residence. The request, presented in July of 1978, was denied by the council pursuant to the

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[1] The court of civil appeal based its holding on the 1921 case of Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 2d 513, which questioned the validity of a zoning ordinance. The power of cities to enact zoning ordinances was fully upheld by the 1926 Supreme Court decision of Village of Euclid v. Ambler Realty Co., 272 U.S. 365.

city's Mobile Home Code, ordinance numbers 58 and 78.[2] Subsequent to the city council's denial of a permit for occupancy, the Comeaus brought this suit against the City.

The Comeaus contend that (1) the ordinances impose an arbitrary restriction on property use, not related to the preservation of the general health, safety, morals or welfare of the community and hence represent an unconstitutional exercise of police power; and (2) the ordinances attempt to regulate in an area preempted by federal and state law[3] and

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[2]Ordinance number 58, enacted in 1970, pertains to regulation of the construction, operation and maintenance of mobile home parks in Brookside Village. Ordinance 78, an amending ordinance to number 58, enacted in 1974, prohibits the location of mobile homes for use as a residence outside of a mobile home park.

[3]See National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401 et seq.; Texas Manufactured Housing Standards Act, TEX. REV. CIV. STAT. ANN. art. 5221f (Supp. 1981).

are thus invalid.

We turn first to consideration of whether ordinances restricting the location of mobile homes to mobile home parks and regulating the construction, operation and maintenance of such parks are valid under a municipality's grant of police power. Both parties concede that the ordinances in question are essentially zoning or land use ordinances. Zoning regulation is a recognized tool of community planning, allowing a municipality, in the exercise of its legislative discretion, to restrict the use of private property. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W. 2d 475 (1934). Judicial review of a municipality's regulatory action is necessarily circumscribed as appropriate to the line of demarcation between legislative and judicial functions. As stated previously by this court: "A

city ordinance is presumed to be valid ... (and) ... the courts have no authority to interfere unless the ordinance is unreasonable and arbitrary - a clear abuse of municipal discretion." Hunt v. City of San Antonio, 462 S.W. 2d 536, 539 (Tex. 1971); see Thompson v. City of Palestine, 510 S.W. 2d 579 (Tex. 1974). The party attacking the ordinance bears an "extraordinary burden" to show "that no conclusive or even controversial or issuable fact or condition existed" which would authorize the municipality's passage of the ordinance. Thompson v. City of Palestine, supra; City of Waxahachie v. Watkins, 154 Tex. 206, 275 S.W. 2d 477 (1955).

The City of Brookside Village has no comprehensive zoning plan. The ordinances before us nevertheless have the effect of a zoning regulation and are to be scrutinized under the aforementioned principles relating to a municipality's exercise of general

police power.[4] We are directed to consider all circumstances and determine, as a substantive matter, if reasonable minds may differ as to whether a particular zoning regulation has a substantial relationship to the protection of the general health, safety or welfare of the public. If the evidence before this Court reveals an issuable fact in this respect, the restriction must stand as valid. City of Waxahachie v. Watkins, supra; Charleston Homeowners Ass'n. v. LaCoke, 507 S.W. 2d 876 (Tex. Civ. App. -

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[4]Because Brookside Village, a general law city, has no comprehensive zoning plan, the ordinances in question do not come under article 1011a, which embodies legislative authorization for zoning. See TEX. REV. CIV. STAT. ANN. art. 1011c (zoning power must be exercised under comprehensive plan). A city, however, may regulate land use under its general police powers. See City of San Antonio v. Pigeonhole Parking, 158 Tex. 318, 311 S.W. 2d 218 (1958); City of Houston v. Johnny Frank's Auto Parts Co., 480 S.W. 2d 774 (Tex. Civ. App. - Houston (14th Dist.) 1972, writ ref'd n.r.e.). See generally City of Sherman v. Simms, 143 Tex. 115, 183 S.W.2d 415 (1944); Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W. 2d 475 (1934).

Dallas 1974, writ ref'd n.r.e.).

Several considerations are advanced by petitioner in support of the council's enactment of ordinances 58 and 78. The city has no municipal water or sewage system, all water and sewage being provided by individual water wells and septic tanks. Potential water and sewage problems of living quarters placed too close together without adequate room for the necessary septic tank drainage area exist because of the geography of the area; the soil around and within Brookside Village is a gumbo or clay of a poor absorption capability. The city's problem with septic tanks and water wells was stated as a major impetus to the passage of ordinance number 58, regulating mobile home parks. The higher incidence of fire in mobile homes, coupled with the need to insure sufficient water well placement for the city's small fire department was also cited as a concern addressed by the regulation.

As originally enacted, ordinance number 58 made allowance for the location of mobile homes outside a mobile home park, with limitations as to lot size. Ordinance 78 deleted such authorization, with the following inclusion: "Parking of mobile homes, camper buses, motor homes and camper trailers, for use as a residence, outside of a mobile home park shall be prohibited." The purpose of the enactment of ordinance number 78, as testified to by a member of the city council, was to control the location of mobile homes moving into the area, a constraint deemed necessary to protect property values and guard against the sewage and water problems by regulation of facilities.

The specific issues of a municipality's regulation of mobile home parks and restriction of location of mobile homes do not appear to have been previously addressed

in this state.[5] We hold that such regulation of mobile homes represents a valid exercise of a municipality's police power. The ordinances here in question bear a substantial relationship to the public health, safety, morals or general welfare. They are not clearly arbitrary and unreasonable, and hence are not unconstitutional. In so holding, we align ourselves with the majority rule of other jurisdictions on the matter of mobile home regulation. See generally Annot., 42 A.L.R. 3d 598 (1972).

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[5]The question of mobile home regulation in Texas, where raised, has been disposed of on other grounds. See Lassiter v. Bliss, 559 S.W. 2d 353 (Tex. 1977) (restrictive covenant prohibition encompassing mobile homes); City of Wichita Falls v. Streetman, 607 S.W. 2d 644 (Tex. Civ. App. - Fort Worth 1980, no writ) (city ordinance restricting location of mobile homes invalid because of failure to publish proper notice); Williams v. Whitten, 451 S.W. 2d 535 (Tex. Civ. App. - Tyler 1970, no writ) (ordinance authorizing restriction of travel trailer park in absence of abutting property owners' consent as improper delegation of police power).

The courts of other jurisdictions have recognized that mobile home parks pose special health problems and are amenable to regulations designed to eliminate such hazards. Regulation of mobile home parks finds additional support in the business of nature of the use. The Supreme Court of Georgia, upholding an ordinance which regulated trailer camps and trailer sites in a township, summarized its rationale as follows:

> The congestion of living conditions inherent in a trailer park, together with the uncertainty as to sanitary conditions, including water, sewage, cooking, bathing and washing facilities, and the fact that the occupants of a trailer park may be to a large extent transitory, are all very patent reasons why such a business is so affected with a public interest as to make it a proper subject for legislative regulation under the broad police powers of the State.

Nichols v. Pirkle, 202 Ga. 372, 43, S.E. 2d 306, 309 (1947). See generally 2 R. Ander-

son, American Law of Zoning § § 11.49-.51 (1968). The record clearly reflects public health concerns particular to the City of Brookside Village to authorize regulation of mobile home parks.

The more specific issues raised herein deals with the city's prohibition as to location of mobile homes. It is well recognized that mobile homes are properly subject to regulation under the police power of towns. See, e.g., Hornstein v. Lovett, 221 Ga. 279, 144 S.E. 2d 378 (1965); Town of Plainfield v. Hood, 108 N.H. 502, 240 A.2d 60 (1968); State v. Albro, 102 R.I. 410, 231 A.2d 1 (1967). See also C. Rhyne, The Law of Local Government Operations § 26.85 (1980). Other jurisdictions which have dealt with the question of restriction of mobile homes to designated areas generally have upheld such ordinances. See Annot., 96 A.L.R. 2d

232, § 5 (1964). As noted by one court, the primary reason for restriction on mobile home location has been that "cities ... found it easier to provide police and fire protection and to regulate health conditions, as well as to provide necessary services such as water, sewage, and lighting." State v. Larson, 292 Minn. 350, 195 N.W. 2d 180, 184 (1972); accord, e.g., State ex rel. Wilkerson v. Murray, 471 S.W. 2d 460 (Mo.), cert. denied, 404 U.S. 851 (1971); Napierkowski v. Gloucester Tp., 29 N.J. 481, 150 A.2d (1959); People v. Clute, 47 Misc. 2d 1005, 263 N.Y.S. 2d 826 (Co. Ct. 1965), aff'd, 18 N.Y. 2d 999, 278 N.Y.S. 2d 231, 224 N.E. 2d 734 (1966). In addition to health and safety hazards, the considerations of encouragement of the most appropriate use of land and conservation of property values have been found proper justification for regulation of the location and use of mobile homes, as integral to the

protection of the general welfare. E.g., Cooper v. Sinclair, 66 So. 2d 702 (Fla.), cert. denied, 346 U.S. 867 (1953); Town of New Boston v. Coombs, 111 N.H. 359, 284 A. 2d 920 (1971); Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 586 P.2d 860 (1978). Cf. Town of Stonewood v. Bell, 270 S.E. 2d 787 (W.Va. 1980) (community harmony as appropriate concern).

The Comeaus assert that ordinance 78 is invalid because mobile homes do not necessarily differ from site-built or conventional housing in relation to the required sewage and water facilities. Respondents argue that mobile homes constructed in accordance with state and federal standards are structurally as safe and aesthetically comparable to conventional housing, thus rendering the purported justification for dissimilar treatment of mobile homes arbitrary. In support of their argument, respondents refer us

to the case of Robinson Tp. v. Knoll, 410 Mic. 293, 302. N.W. 2d 146, 150-51 (1981), wherein it was said:

> The mobile home today can compare favorably with site-built housing in size, safety and attractiveness. To be sure, mobile homes continue to be manufactured. But the assumption that all mobile homes are different from all site-built homes with respect to criteria cognizable under the police power can no longer be accepted.

While we recognize the substantial improvements made in modern mobile homes, we do not perceive the similarities between mobile homes and conventional housing as sufficient to overcome the presumption of the ordinance's constitutionality. We find that adequate governmental interests are served by regulation of the location of mobile homes. Mobile homes, by definition, are manufactured to permit movement; the inherent structural differences in such manufactured housing can make them vulnerable to windstorm and fire damage; and their

mobile nature may lead to transience and detrimentally impact property value if scattered throughout a municipality.

It is possible that the general improvements in appearance and quality of manufacture of mobile homes will persuade municipalities to alter ordinances similar to the one before us. Such changes, however, should be made through the legislative, not the judicial process. This principle has its inception in judicial acknowledgment of zoning power.

> State legislature and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Gorieb v. Fox, 274 U.S. 603, 608 (1927), referring to Village of Euclid v. Ambler Realty Co., supra. The conditions of urban development addressed by the Gorieb court continue

to exist in substance, as does the admonition against unwarranted judicial reordering of legislative schemes. With respect to mobile homes, the upgrading of the quality of such housing under federal and state construction standards may well serve to alleviate previous concerns as to their structural safety. But the fact remains that a large number of mobile homes, manufactured prior to the 1976 construction and safety standards acts, exist.[6] An adjudication of the appropriate measure of regulation of mobile homes constructed in conformance with federal and state standards is the prerogative of local and state governing bodies.

The position of the Comeaus, that ordinance 78 is invalid is an arbitrary regulation violative of the Equal Protection Clause, is likewise founded on the similar-

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[6]The record reflects that more than one-half of the mobile homes located in Brookside Village were manufactured before 1976.

ities between mobile homes and conventional housing. The argument is based on the fact that both types of structures fall within the classification of "residences or dwellings." That mobile homes may be favorably compared with certain site-built homes or modular housing is not dispositive of the constitutional issue involved. As recognized in several jurisdictions, mobile homes are different and thus may be classified separately from other residential structures for purposes of regulation. See, e.g., State ex rel. Wilkerson v. Murray, supra; Duckworth v. City of Bonney Lake, supra; Town of Stonewood v. Bell, supra; Currituck Co. v. Willey, 46 N.C. App. 835, 266 S.E. 2d 52 (1980). We find such classification reasonable, as bearing a substantial relation to the preservation of public health, safety, morals, or general welfare. The ordinances of Brookside Village do not prohibit the location of mobile homes in the municipality but rather require their placement in a

regulated area to insure proper facilities are present and to preserve property values. Because all mobile home owners, desiring to use their structures as residences, are treated alike under ordinance number 78, no denial of equal protection is presented. See Town of Ascarate v. Villalobos, 148 Tex. 254, 223 S.W. 2d 945 (1949).

The additional issue before us is whether the challenged ordinances are preempted by federal and state legislation. Our attention has been directed to the federal Manufactured Housing Construction and Safety Standards Act[7] and the Texas Manufactured Housing Standards Act.[8] Both the federal and state act contain preemption provisions, with regard to mobile home construction, safety and installation

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[7] 42 U.S.C. §§ 5401 et. seq. (1974).

[8] TEX. REV. CIV. STAT. ANN. art. 522 1f (Supp. 1981).

standards.[9]

Clearly, an ordinance which conflicts or is inconsistent with state legislation is impermissible. Jere Dairy, Inc., v. City of Mt. Pleasant, 417 S.W. 2d 872 (Tex. Civ. App.-Texarkana 1967, writ ref'd n.r.e.). The entry of the state into a field of legislation, however, does not automatically preempt that field from city regulation; local regulation, ancillary to and in harmony with the City of

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[9] See 42 U.S.C. § 5403(d): "Whenever a Federal mobile home construction and safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any mobile home covered, any standard regarding construction or safety applicable to the same aspect of performance of such mobile home which is not identical to the Federal mobile home construction and safety standard."

The Texas act provides as follows: "A political subdivision of this state, without express approval of the department following a hearing on the matter, may not adopt different standards from those promulgated by the department for the construction or installation of manufactured housing within the political subdivision." TEX. REV. CIV. STAT. ANN. art. 5221f, § 4(c)

Weslaco v. Melton, 158 Tex. 61, 308 S.W. 2d 18 (1957); City of Beaumont v. Jones 560 S.W. 2d 710 (Tex. Civ. App. - Beaumont, 1977 writ ref'd n.r.e.).

The referenced state and federal legislation has, to an extent, preempted the field as to construction, safety, and installation of mobile homes. We find nothing in the statutes however, that creates a conflict with the Brookside Village ordinances regulation the location of mobile homes. Accordingly, ordinances 58 and 78, insofar as they do not pertain to the subject matter of the regulation under the federal and state acts, are upheld as compatible with federal and state legislation.

The judgment of the court of civil appeals is reversed and that of the trial court is affirmed

Charles W. Barrow
Justice

OPINION DELIVERED: May 19, 1982

From Clerk's Office, 14th Court of Civil Appeals, Houston, Texas

Affirmed in part and reversed and rendered in part and Opinion filed April 8, 1981.

HOMER N. COMEAU, ET AL, Appellants

NO. B2497 V.

CITY OF BROOKSIDE VILLAGE, ET AL, Appellees

- - - - - - - - - - -

Appeal from the 149th District Court of Brazoria County

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This case involves the constitutionality of two city ordinances of the City of Brookside Village. Appellants, Homer N. Comeau and Hazel A. Comeau, plaintiffs in the trial court, appeal from a judgment rendered in favor of defendant, appellee, City of Brookside Village. We affirm in part and reverse and render in part.

Appellants are the owners of a four acre lot in City of Brookside Village. In July of 1978, appellants presented a request to the city council that they be allowed to move

their mobile home on to the property for use as their residence. The request was denied by the city council on August 3, 1978. On or about September 8, 1978, appellants, moved the home onto their property. Appellants also have a store, icehouse, and storage sheds on the premises. Appellants brought this suit for injunctive relief and damages against the City of Brookside Village. After trial to the court, the court rendered its judgment that appellants take nothing and that appellants move their mobile home from its unauthorized location within sixty days from the final judgment.

At issue are Ordinances No. 58 and No. 78. Ordinance No. 58 pertains to mobile home parks and defines a mobile home as a portable vehicle constructed on a chassis and which has been designed so that it may be occupied and used without a permanent foundation. The trial court found that appellants' home is a mobile home and that finding is not challenged in this court. Ordinance No. 78

amended No. 58 and provides in section 11, "(p)arking of mobile homes, camper buses, motor homes and camper trailers, for use as residence, outside of a mobile home park shall be prohibited." Appellants attack the constitutionality of this ordinance on various grounds.

Appellants complain that the trial court erred in finding that Ordinances No. 58 and No. 78 are valid and constitutional as they bear no substantial relationship to the public health, safety, morals or general welfare. Appellants also assert that no evidence was presented to support a finding that mobile homes should be regulated in a different manner than on-site built structures. We agree. The right of a citizen to use his property as he chooses so long as he harms nobody is an inherent and constitutional right. Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921). The police power cannot be invoked for the abridgement of

a particular use of private property unless such use threatens the public health, the public safety, the public comfort or welfare. Id. The mayor of City of Brookside Village, Eston Louis Boehm, Jr., testified that the City has no water or sewage facilities. Residents must install septic tanks and a health problem is created when too many septic tanks are in an area. The mayor stated the city wanted to limit mobile homes to mobile home parks because of the lack of sewage, water and fire protection. He stated the ordinance was for the safety and welfare of the citizens of the city. The mayor did state, however, that the requirements for utilities for a site-built house and a mobile home are the same. Don Marshall Rives, building official for the City of Brookside, also testified that there is no distinction between the functioning of a septic tank or water well at a mobile home or a site-built home. If the system were installed correctly, it could work just as well for either type

of construction.

Appellee City has not shown that a threat to the public health is present if appellants have a mobile home outside of a mobile home park. The threat to the public health in City of Brookside occurs when too many septic tanks are too close to one another. The gumbo type soil in the area can not absorb all of the water and a health hazard results. The City can not restrict appellants in the free use of their property if no public interest is involved. There is also no justification here for distinguishing between an on-site built house and a mobile home. If appellants built a house on their property, they would not be in violation of the ordinance. Their on-site built house would require a septic system and water well. There is no increased threat to the public health when the same septic system and water well are used in conjunction with appellants' mobile home. Appellants' four acre tract is sufficiently large to accommodate a sep-

tic system and water well without the threat of any health hazard. We find that Ordinances No. 58 and No. 78 are an invalid exercise of the police power. The police power authorizes only such measures as are reasonable. Lombardo v. City of Dallas, 73 S.W. 2d 475 (Tex. 1934). An ordinance must be reasonable in its operation upon the persons whom it effects and the means adopted must be reasonably necessary and appropriate for the accomplishment of a legitimate object. Id. The ordinances of City of Brookside unfairly restrict appellants' use of their property and no legitimate state interest is served.

We affirm the portion of the trial court judgment ordering that appellants take nothing. We reverse the judgment in so far as it decrees that Ordinances No. 58 and No. 78 are constitutional and that appellants must remove their mobile home from its unauthorized location. We render judgment that the ordinances are invalid and that

appellants' mobile home may remain on their property.

/s/Edward D. Coulson
Associate Justice

Judgment rendered, and Opinion filed April 8, 1981.

Panel consists of Associate Justices Coulson, Miller and Murphy.

THE STATE OF TEXAS I

COUNTY OF HARRIS I

I, THELMA MUELLER, Clerk of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, at Houston, do hereby certify that the preceding 3 pages contain a true and correct copy of Court's opinion in Cause No. B2497, HOMER N. COMEAU, ET.AL., Appellants VS. CITY OF BROOKSIDE VILLAGE ET AL, Appellees from BRAZORIA County, and now on file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of Said Court, at Houston, this the 5th day of June, A.D. 1981.

_____
Clerk

By _____

(SEAL)

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 Capitol Station

Austin, Texas 78711

June 30, 1982

Chief Justice
Joe R. Greenhill

Clerk
Garson R. Jackson

Justices
Jack Pope
Sears McGee
Charles W. Barrow
Robert M. Campbell
Franklin S. Spears
C.L. Ray
James P. Wallace
Ruby Kless Sondock

Executive Asst.
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Mary Ann Defibaugh

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3616 Preston Road
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777 South Post Oak Road-Suite 990
Houston, TX 77056

Dear Sirs:

This is to advise that the motion for rehearing in the case of CITY OF BROOKSIDE VILLAGE vs. HOMER N. COMEAU ET UX., No. C-431, was this day overruled.

Very truly yours,,

Garson R. Jackson,
Clerk

App. "C"

Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS
CLERK

No. 82-689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HOMER N. COMEAU, *et ux.*,
Petitioners,

v.

CITY OF BROOKSIDE VILLAGE, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-689

HOMER N. COMEAU, *et ux.*,

Petitioners,

v.

CITY OF BROOKSIDE VILLAGE, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Respondents City of Brookside Village ("Brookside" or "City"), the mayor and the members of the city council, through counsel, submit this opposition to the Petition for a Writ of Certiorari to the Supreme Court of Texas ("Petition") in the above-captioned action.*

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*In addition to petitioners Homer and Hazel Comeau and respondent Brookside, the remaining parties are respondents, the mayor and the members of the Brookside city council, who were made nominal parties to this action. At the time the suit was filed, these individuals were: Louis Boehm-Mayor; and Shirley Zamorsky, Frank Gonzales, Stanley S. Chock, Boyd Christman, and Eugene Satterwhite-councilmembers. At present, these officials are: Phillip W. Rutter-Mayor; and Shirley Zamorsky, Sheryl Karolinski, Darvan Webb, Jerry DeWeese, and Eugene Satterwhite – councilmembers. To the extent that the present officials are different from the previous officials, the new officials are substituted for their predecessors pursuant to Rule 40.3 of this Court's rules.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Supreme Court of Texas is reported at 633 S.W.2d 790 (Tex. 1982), and is reprinted in Appendix A to the Petition. The opinion of the Civil Court of Appeals of Texas is reported at 616 S.W. 2d 333 (Tex. Civ. App. 1981) and is reprinted in Appendix B to the Petition. The Judgment of the District Court of Brazoria County, Texas, 149th Judicial District is unreported and is reprinted in Appendix A to this opposition, at 4a. The district court's Findings of Fact and Conclusions of Law is unreported and is reprinted in Appendix A to this opposition, at 1a. The district court's Temporary Restraining Order and Show Cause Order and Order Granting Preliminary Injunction also are unreported and are reprinted in Appendix A to this opposition, at 10a and 7a respectively.

JURISDICTION

Petitioners incorrectly allege jurisdiction of this Court under 28 U.S.C. § 1254 (1) (1976). Section 1254(1) only pertains to cases in the federal courts of appeals. If this Court has jurisdiction, it may be based only on 28 U.S.C. § 1257 (1976).

CONSTITUTION, STATUTE AND ORDINANCES

In addition to the constitutional and statutory provisions set forth in the Petition, the tenth amendment to the Constitution, section 5401 of the National Manufactured Housing Construction and Safety Standards Act of 1974, Brookside Ordinances 58 and 78 are involved, and are reprinted in Appendix B to this opposition, at 13a.

STATEMENT OF THE CASE

I. The City of Brookside Village.

Brookside is an incorporated city of approximately two square miles[1] with a population of about 1,400 persons[2]. The City is a residential or "bedroom" community and has no industry.[3] The land surrounding and within Brookside is composed of gumbo and clay, both of which have poor absorption capabilities.[4] In addition, the City is in a low elevation area,[5] and, as a result, is susceptible to flooding[6].

Brookside has no water or sewage system.[7] Instead, these facilities are provided by individual water wells and septic tanks.[8] Due to the cost of installing either a water or sewage system, it is unlikely that Brookside ever will have such systems.[9]

On October 6, 1970, Brookside's Board of Aldermen enacted

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[1]Statement of Facts at 132, Comeau v. City of Brookside Village, No 78-F2046 (Dist. Ct. Tex. Mar. 4, 1980) (trial testimony of Eston Louis Boehm, Jr., Mayor of Brookside) [hereinafter cited as S.F.].

[2]Bureau of The Census, U.S. Dept. of Commerce, PHC80-V- 45, 1980 Census of Population and Housing-Texas 34 (1981).

[3]S.F., *supra* note 1, at 132 (testimony of Mayor Boehm).

[4]City of Brookside Village v. Comeau, 633 S.W.2d 790,793 (Tex. 1982), *petition for cert. filed sub nom.* Comeau v. City of Brookside Village, 51 U.S.L.W. 3,341 (U.S. Sep. 28, 1982) (No. 82-689); S.F., *supra* note 1, at 63 (testimony of Don Marshall Rives, building official for Brookside).

[5]S.F., *supra* note 1, at 26 (testimony of Mayor Boehm).

[6]*Id.* at 59 (testimony of Lloyd Yost, Superintendent of Brazoria County Drainage District No. Four).

[7]City of Brookside Village v. Commeau, 633 S.W.2d at 793.

[8]*Id.*

[9]*See* S.F., *supra* note 1, at 133-34 (testimony of Mayor Boehm).

Ordinance 58, which provided standards for mobile home parks.[10] Section I(N) defined a mobile home as:

> a portable vehicle constructed on a chassis and which has been designed so that it may be occupied and used without a permanent foundation. For the purposes of the Ordinance, a mobile home shall mean a single family dwelling unit suitable for year-round occupancy and which has provision for electrical and water connections and which provides for waste disposal in compliance with the Plumbing Code requirements for dwellings.

To guard against flooding, erosion and other "adverse influences," Ordinance 58 provided soil, ground cover and site drainage requirements,[11] In addition, the ordinance, inter alia, set forth water supply, sewage disposal and fire protection standards.[12]

Subject to certain restrictions, ordinance No. 58 also allowed mobile homes to be placed outside of mobile home parks. For example, a single mobile home could be located outside a mobile home park only if it were placed on a lot of at least nine thousand (9,000) square feet.[14]

On April 14, 1974, Brookside's city council enacted Ordinance 78, amending Ordinance 58, to limit the future location of mobile homes in Brookside to mobile home parks.[15] Mobile homes previously installed in accordance with Ordinance 58 were allowed to remain in place and continue to be occupied.[16]

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[10]Brookside Village, Tex., Ordinance 58 (Aug. 6, 1970).

[11]*Id.* § IX.

[12]*Id.* §§ X, XI, XVI.

[13]*Id.* § XVIII.

[14]*Id.* § XVIII(B).

[15]Brookside Village, Tex., Ordinance 78, §§ I, II (Apr. 14, 1974).

[16]*Id.* § III.

Among the stated reasons behind the enactment and continued maintenance of Ordinance 78 were:

1) The higher incidence of fire among Brookside's mobile homes, together with a restricted supply of water and a small, volunteer fire department;[17]

2) Concern for the placement of large numbers of mobile homes on plots of land too small to accommodate septic tanks and the requisite drainage area, in light of the poor absorbtion quality of the soil;[18] and

3) Aesthetic considerations[19] and the negative impact of mobile homes on surrounding property values, due in part, to the rapid rate of deterioration of mobile homes relative to site-built houses.[20]

As of February 11, 1980, the date of the trial, there was one mobile home park within Brookside and several mobile home parks immediately outside of Brookside.[21]

II. Actions Taken by the Comeaus.

The Comeaus are the owners of a parcel of land located at 12700 Mykawa Road, Brookside, Texas.[22] On or about July 10,

[17]S.F., *supra* note 1, at 42-43, 48-49, 51 (testimony of Mayor Boehm).

[18]*Id.* at 85-86 (testimony of city councilmember Frank Noe). The ordinances of Brookside do not specify the size of land on which a site-built house must be placed. However, councilmember Noe testified that the majority of site-built houses in Brookside are built on plots of land of three-quarters to one acre, and that nine thousand (9,000) square feet, the requisite size of plots for mobile homes outside of mobile home parks, under Ordinance 58, § XVIII (B), was only about one-quarter of an acre.

[19]*Id.* at 27 (testimony of Mayor Boehm).

[20]*Id.*at 79-80, 84-85 (testimony of Councilmember Noe).

[21]*Id.* at 24 (testimony of Mayor Boehm).

[22]Agreed Order as to Stipulated Facts ¶II (3) [hereinafter cited as Stipulation].

1978, more than four years after the enactment of Ordinance 78, petitioners applied to the city council for permission to place a mobile home on their land.[23] On or about August 3, 1978, the city council advised petitioners of its denial of their request.[24] On or about September 7, 1978, petitioners purchased a mobile home.[25] Notwithstanding the council's denial of their request, and without applying for a permit to install a septic tank,[26] on or about September 8, 1978, petitioners caused the above mobile home to be transported to their property.[27] Thereafter, petitioners took action to prevent the enforcement of Ordinances 58 and 78.

III. Proceedings Below.

Petitioners instituted this action on September 8, 1978, by filing in the District Court of Brazoria County, Texas, 149th Judicial District, Plaintiffs' Original Petition for Temporary Restraining Order, Temporary Injunction and Other Relief ("Complaint"). So that they could occupy their mobile home, petitioners sought the issuance, without notice, of a temporary restraining order enjoining Brookside and its agents from denying petitioners all permits and certificates necessary for the connection of utilities.[28] In the alternative, petitioners sought a

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[23]Plaintiffs' Trial Brief at 1.

[24]*Id.*

[25]Stipulation, *supra* note 22, ¶ II(2). Petitioners stipulated that the structure which they purchased was a "mobile home." S.F., *supra* note 1, at 92 (statement by plaintiffs' counsel); Stipulation, *supra* note 22, ¶ II.

[26]S.F., *supra* note 1, at 89 (testimony of Homer Comeau).

[27]Stipulation, *supra* note 22, ¶ II(2).

In addition to the mobile home, there is situated on petitioners' land, a store and icehouse, in one building, and two trailers, one twelve feet by fifty feet and the other twelve feet by sixty feet, which Mr. Comeau brought onto petitioners' land for use as storage sheds in Mr. Comeau's "trailer park." S.F., *supra* note 1, at 90 (testimony of Homer Comeau).

[28]Compl. *ad damnum* clause.

temporary injunction requesting the same relief.[29] Finally, petitioners sought a permanent injunction, a declaration that Ordinances 58 and 78 were unconstitutional as to their prohibition "of the location of placement of a mobile home on private property within the municipal limits of said City" and an unspecified amount of monetary damages.[30]

On September 21, 1978, the court issued a temporary restraining order enjoining and restraining Brookside and its agents from denying petitioners the use and quiet possession of their mobile home.[31] Following a hearing on October 2, 1978, the court converted the temporary retraining order into a temporary injunction,[32] which remained in effect through the trial.

Trial without jury was held on February 11, 1980, and, on March 4, 1980, the court rendered its Judgment.[33] The Judgment upheld Ordinances 58 and 78, and, consequently, directed petitioners to remove their mobile home from its unauthorized location within sixty (60) days of the Judgment's becoming final. Following issuance of the Judgment, petitioners, on March 4, 1980, filed a motion for a new trial.

At petitioners' request, the court, on May 9, 1980, issued Findings of Fact and Conclusions of Law.[34]

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[29] *Id.*

[30] *Id.*

[31] Comeau v. City of Brookside Village, No. 78-F2046 (Dist. Ct. Tex. Sept. 21, 1978) (Temporary Restraining Order and Show Cause Order).

[32] Comeau v. City of Brookside Village, No. 78-F2046 (Dist. Ct. Tex. Oct. 30, 1978 (Order Granting Temporary Injunction).

[33] Comeau v. City of Brookside Village, No. 78-F2046 (Dist. Ct. Tex. Mar. 4, 1980), *rev'd*, 616 S.W. 2d 333 (Tex. Civ. App. 1981), *rev'd sub nom.* City of Brookside Village v. Comeau, 633 S.W. 2d 790 (Tex. 1982), *petition for cert. filed sub nom.* Comeau v. City of Brookside Village, 51 U.S.L.W. 3,341 (U.S. Sept. 28, 1982) (No. 82-689).

[34] Comeau v. City of Brookside Village, No. 78-F2046 (Dist. Ct. Tex. May 9, 1980).

As fact, the court found: Ordinances 58 and 78 were duly passed and in effect prior to the date petitioners purchased their mobile home, which home met the definition of "mobile home" in Ordinance 58; the lack of municipal water and sewage systems in Brookside created a potential health hazard; Ordinances 58 and 78 bore a substantial relationship to the public health, safety, morals and general welfare; and petitioners' placement of their mobile home on their property violated Ordinances 58 and 78.[35] As law, the court concluded that Ordinances 58 and 78 were not an abuse of discretion, were a valid exercise of the city council's police power, and, therefore, were constitutional.[36]

On May 6, 1981, petitioners' motion for a new trial was overruled by operation of law, and petitioners thereafter filed an appeal with the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas at Houston. The court of appeals reversed the trial court's decision holding Ordinances 58 and 78 to be constitutional and directing petitioners to remove their mobile home.[37] The court found that Brookside had not shown a threat to public health to be present by the placement of petitioners' mobile home outside of a mobile home park.[38] The court concluded that there was no justification for treating mobile homes differently from site-built houses, and that, therefore, Ordinances 58 and 78 were an invalid exercise of Brookside's police power.[39] The court of appeals denied respondents' request for

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[35] *Id.* at 1.

[36] Id. at 2.

[37] Comeau v. City of Brookside Village, 616 S.W.2d 333 (Tex. Civ. App. 1981), *rev'd sub nom.* City of Brookside Village v. Comeau, 633 S.W. 2d 790 (Tex. 1982), *petition for cert. filed sub nom.* Comeau v. City of Brookside Village, 51 U.S.L.W. 3,341 (U.S. Sept. 28, 1982) (No. 82-689).

[38] *Id.* at 334.

[39] *Id.*

rehearing, and respondents then filed with the Supreme Court of Texas an application for writ of error.

The Texas Supreme Court reversed the judgment of the court of appeals and affirmed the judgment of the trial court.[40] The court first outlined the standard of review applicable to a zoning or other land use regulation and reiterated that such a regulation is presumed valid and is upheld unless the party challenging the regulation shows it to be arbitrary and unreasonable.[41] The court recognized that passage of Ordinances 58 and 78 was motivated by the considerations set forth at 5 *supra,* and concluded that they bore "a substantial relationship to the public health, safety, morals or general welfare" and were "not clearly arbitrary and unreasonable."[42] Next, the court observed that improvements had been made in the quality and appearance of mobile homes subsequent to passage of the National Manufactured Housing Construction and Safety Standards Act of 1974 ("NMHCSSA"),[43] noted that a majority of Brookside's mobile homes were made prior to implementation of federal standards for mobile homes, and concluded that, in any event, any change in Brookside's policy toward the location of mobile homes should be made by the city council and not the court.[44] Finally, the court held that Ordinances 58 and 78 were not in conflict with either the NMHCSSA or the Texas Manufactured Housing Standards Act ("TMHSA"),[45] and, therefore, were not pre-empted by either act.[46]

Petitioners moved the Texas Supreme Court for a rehearing, but, on June 30, 1982, the court overruled the motion.

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[40]City of Brookside Village v. Comeau, 633 S.W.2d 790 (Tex. 1982).

[41]*Id.* at 792-93.

[42]*Id.* at 793-94.

[43]42 U.S.C. §§ 5401-5426 (1976 & Supp. V 1981).

[44]633 S.W.2d at 795 & n.6.

[45]Tex Rev. Civ. Stat.Ann. art 5221f. (Vernon Supp. 1971-1982).

[46]633 S.W.2d at 796.

SUMMARY

The issues petitioners raise are neither novel nor unresolved by this Court. Perhaps in recognition of this, petitioners have abandoned entirely their first issue – whether Ordinances 58 and 78 have effected a taking of petitioners' property. Even if the Court, sua sponte, were to consider this issue, a multiplicity of decisions of this Court establish that a taking has not occurred. Ordinances 58 and 78 were in effect prior to petitioners' purchase of their mobile home. The ordinances limit only slightly the uses of petitioners land, and certainly leave open economically viable uses. Further, the ordinances advance legitimate state interests, i.e. protection of the public health, safety, morals and general welfare.

Ordinances 58 and 78 also do not violate the due process and equal protection clauses of the fourteenth amendment. Mobile homes are not the same as site-built houses. If they were, this case would not have been brought. The city council did not exclude mobile homes from Brookside, but, in recognition of the differences between site-built houses and mobile homes, required mobile homes to be located in mobile home parks. Ordinances 58 and 78 are presumed valid, and petitioners have not met their burden of showing that the ordinances are unreasonable and arbitrary, and could not reasonably be related to the public health, safety, morals or general welfare.

Finally, the NMHCSSA has not pre-empted Ordinances 58 and 78. The NMHCSSA provides construction and installation standards for mobile homes, while Ordinances 58 and 78 pertain to the location of mobile homes and the requirements for mobile home parks. As such, the ordinances in no way conflict with the NMHCSSA. Any other conclusion, particularly with respect to the ordinances' locational requirements, would result in a violation of the tenth amendment to the Constitution by allowing the federal government to displace the traditional power of states and cities to control land use.

REASONS FOR DENYING THE PETITION

1. Petitioners Have Abandoned the Taking Issue, and, in Any Event, Numerous Decisions of This Court Establish that a Taking Has Not Occurred.

The first issue raised in petitioners' Questions Presented is whether the ordinances of Brookside which limit the location of mobile homes to mobile home parks deprive "Petitioners of the Fourteenth Amendment's right to aquire, enjoy, own and dispose of property" – the taking issue.[47] Petitioners, however, fail to address this issue either in their Reasons for Granting the Petition or anywhere else in the Petition. From this, one only can surmise that petitioners have abandoned their first issue. This factor, alone, provides the Court with ample justification for not considering petitioners' first issue. Even if the Court were to consider the taking issue, it is readily apparent from numerous decisions by this Court that respondents have not taken petitioners' property.

Even before the seminal case upholding the zoning power of states and cities, *Village of Euclid v. Ambler Realty Co.*,[48] this Court upheld land use regulations against taking challenges brought under the fifth and fourteenth amendments to the Constitution. For example, in *Welch v. Swasey*,[49] this Court upheld a Massachusetts law restricting the height of certain buildings within Boston to 80 to 100 feet. In dismissing the taking argument, the Court concluded:

> We are not prepared to hold that this limitation of 80 to 100 feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination just made is, as we

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[47] Petition at i.

[48] 272 U.S. 365 (1926).

[49] 214 U.S. 91 (1901).

> think, reasonable, and is justified by the police power.[50]

Subsequently, in *Euclid*, the Court again rejected a taking argument, this time in the context of an ordinance establishing a zoning plan for the Village of Euclid, Ohio, the effect of which, it was alleged, was to destroy certain uses for which plaintiff had purchased lands in Euclid. The Court held that the ordinance was a valid exercise of the city's police powers.[51] Although the Court did not address specifically the taking issue, but focused primarily on the due process and equal protection aspects of the case, it is evident from the Court's holding that it concluded that the ordinance in issue had not effected a taking.[52]

The opinion in *Goldblatt v. Town of Hempstead*[53] offers a sound explanation of why land use restrictions are not considered unconstitutional takings:

> It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If the ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. . . . As pointed out in Mugler v. Kansas, [123 U.S. 623, 688 (1887)] . . . 'A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by

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[50] *Id.* at 107.

[51] 272 U.S. at 397.

[52] *See* Agin v. City of Tiburon, 447 U.S. 255, 261 (1980), Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125, 133-34 (1978).

[53] 369 U.S. 590 (1962).

> any one, for certain forbidden purposes, is prejudicial to the public interest. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not – and, consistently with the existence and the safety of organized society, cannot be – burdened with the condition that the state must compensate such individual owners for the pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."[54]

This reasoning is present in recent zoning and other land use cases wherein the Court repeatedly has declined to find a taking based upon property use restrictions.

In *Penn Central Transportation Co. v. City of New York*,[55]

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[54] *Id.* at 592-93.

Citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Court recognized the possibility that, under certain, limited circumstances, a land use regulation could amount to a taking. At issue in *Mahon* was a Pennsylvania statute, enacted after plaintiffs' sale of surface property to defendants, which prevented plaintiffs from mining coal beneath defendants' property, and thereby destroyed entirely plaintiffs' rights to their coal. 260 U.S. at 412, 414. Even in holding that a taking had occured, the Court recognized that "government hardly could go on if, to some extent, value incident to property could not be diminished without paying for every change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to police power." *Id.* at 413. This quotation is directly applicable to the instant suit. As discussed more fully at 21-22 *infra*, Ordinances 58 and 78 were enacted for the health, safety, morals and general welfare of the citizens of Brookside, and, thus, were a proper exercise of the city council's police power. Further, as discussed at 15 *infra*, the uses to which the petitioners' property may be put have not been eliminated, but only lessened slightly. Therefore, even under *Mahon*, the ordinances have not effected a taking.

[55] 438 U.S. 104 (1978).

plaintiffs challenged under the property provisions of the fifth and fourteenth amendments a New York City law enacted to protect historical landmarks from destruction or significant alteration. Specifically, plaintiffs challenged a decision of the Landmarks Preservation Commission denying approval of plaintiffs' plan for construction of a fifty (50)-story office building over New York's Grand Central Terminal, on the grounds that such a building would destroy the Terminal's aesthetic features. In holding that the law had not effected a taking, the Court reviewed the history of taking challenges under the fifth amendment's property clause,[56] and, inter alia, observed:

> In instances in which a state tribunal reasonably concluded that the "health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. . . . Zoning laws are, of course, the classic example, . . . which have been viewed as permissible governmental action even when prohibiting the most beneficial use of property.[57]

More recently, in *Agin v. City of Tiburon,*[58] the Court reaffirmed the principles set forth in the above cases. Plaintiffs purchased for residential development five acres of land in Tiburon, California. In consequence, and pursuant to state law, the city enacted two zoning ordinances which restricted to between two and five the number of single-family residences plaintiffs would be allowed to construct on their land. Plaintiffs' facial attack on the ordinances alleged that the ordinances had taken their property in violation of the fifth and fourteenth amendments. In again rejecting the taking argument, the Court

[56]The Court noted that the meaning of the fifth amendment's property clause had been made applicable to the States through the fourteenth amendment. *Id.* at 122.

[57]*Id.* at 125 (citations omitted).

[58]447 U.S. 255 (1980).

reasoned that a zoning law may effect a taking only if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . ."[59] Neither of these conditions is present in the instant suit.

Ordinances 58 and 78 were in effect prior to the purchase of petitioners' mobile home. In addition, the city council had denied petitioners' request for permission to place a mobile home on their land. Nevertheless, petitioners purchased a mobile home,[60] and, in violation of the ordinances and the city council's decision, placed this mobile home on their property. Petitioners, therefore, cannot complain, even if such a complaint could have merit, that the ordinances deprived them of a use of their property for which they could have had a reasonable expectation at the time they purchased their mobile home. Moreover, there are a variety of economically viable uses to which petitioners' property may be devoted. For example, there already is a store on the premises.[61] In addition, petitioners assert that "the City ordinances will allow the Petitioners to place a business or commercial venture (including a high density, high rise apartment complex) on their property."[62] Indeed, the only limitation at present on the uses of petitioners' property is the restriction against the placement thereon of a mobile home. Under these circumstances, not even petitioners legitimately could contend that Ordinances 58 and 78 leave them without an economically viable use for their property.

[59] *Id.* at 260.

[60] The record does not reveal the exact date on which petitioners purchased the land on which their mobile homes is situated. However, it would appear that they bought the land in mid-1978, a short time before they bought the mobile home but long after the effective dates of the ordinances. This supposition is based on Mr. Comeau's Affidavit Supporting Temporary Order, wherein Mr. Coumeau stated that he and his wife had purchased the land at 12700 Mykawa Road, had sold their former residence and had to vacate its premises by September 10, 1978.

[61] S.F., *supra* note 1, at 90.

[62] Petition at 11.

Not only do the ordinances in question reserve to petitioners a variety of uses for their property, but they also advance legitimate state interests. As discussed more fully at 21-22 *infra*, the limitation on the location of mobile homes was predicated on considerations of the relative susceptibility to fire of mobile homes, particularly in light of the availability of water and the limited capabilities of the fire department, the absence of a municipal sewage facility and aesthetics. This Court consistently has held each of these concerns to be a valid state interest, which warrants a city's exercise of its police power. Ordinances 58 and 78, therefore, have not effected a taking of petitioners' property in violation of the fourteenth amendment.[63]

II. Ordinances 58 and 78 Are Valid Under the Due Process and Equal Protection Clauses Because They Are Reasonably Related to the Protection of the Public Health, Safety, Morals and General Welfare, and Petitioners Have Failed To Meet Their Burden of Showing Otherwise.

The thrust of petitioners' argument is that the ordinances requiring mobile homes to be placed in mobile home parks violate the equal protection and due process clauses of the fourteenth amendment because they do not "bear a substantial relationship to public health, safety or general welfare but rather . . . [are] arbitrary, unreasonable and irrationale [sic]."[64] Unable, how-

[63]As noted at 11 *supra*, as part of their taking issue, petitioners contend that the ordinances deprive them of their right "to acquire . . . own and dispose of property." These contentions also are entirely devoid of merit. That the ordinances have not deprived petitioners of any right to acquire or own property is seen by the fact that, notwithstanding the existence of the ordinances, petitioners purchased, and own in fee simple, Compl. ¶I, the land on which their mobile home is situated. Further, there is no allegation that, as a result of the ordinances, petitioners have been unable to sell their property.

[64]Petition at i. In their Questions Presented, petitioners only refer to Ordinance 58 as being violative of the due process and equal protection clauses. Presumably, petitioners meant Ordinance 58, as amended by Ordinance 78, because Ordinance 78 is the ordinance which actually limits the location of mobile homes to mobile home parks.

ever, to find zoning or other land use decisions from this Court to support their position, petitioners attempt to equate mobile home owners with black citizens in order to gain reliance on such cases as *Brown v. Board of Education*[65] and *McLaughlin v. Florida*[66] for their attack on Brookside's mobile home ordinances.[67] Not only does this approach trivialize these and other cases which have marked significant gains for blacks and other recognized minorities,[68] but it ignores decisions of the Court

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[65]347 U.S. 483 (1954).

[66]379 U.S. 184 (1964).

[67]Petition at 7-9, 18.

[68]While petitioners concede that mobile home owners are not a "suspect classification," Petition at 24, they contend that they are a "discrete and insular minority," Petition at 24-25. Petitioners support this novel conclusion on the following phrase from United States v. Carolene Prods. Co., 304 U.S. 144 (1938): "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry," 304 U.S. at 153 n.4. Petition at 20-21, 24-25. Petitioners took this phrase out of context, and, in so doing, omitted the portion of the sentence which identified the individuals who fell within the Court's classification of a discrete and insular minority," The portion of the sentence petitioners omitted read: "Nor need we inquire into whether similar considerations enter into the review of statutes directed at particular religions . . . or national . . . or racial minorities. . ." *Id.* (citations omitted). Because petitioners are neither a "suspect classification" nor a "discrete and insular minority," Brookside's ordinances are not subject to a standard of review, for equal protection purposes, any stricter than the traditional reasonableness standard set forth in *Euclid* and its progeny.

Similarly, for due process purposes, petitioners neither have identified nor could identify any "fundamental right" which is in issue. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court identified the following "fundamental rights": voting, the right of association, the right of access to the courts and the right of privacy. 416 U.S. at 7. The "fundamental right" to freedom of expression, *see, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), also is not in issue. Because "fundamental rights" are not involved, Brookside's mobile home ordinances are not subject to any strict standard of review applicable where "fundamental rights" are involved.

which are directly on point, and resolve petitioners' due process and equal protections claims. As mentioned previously, *Village of Euclid v. Ambler Realty Co.* is the leading case on the zoning power of states and cities. In upholding this power, the Court set forth the standards which govern zoning and other land use regulations:

> If these reasons . . . do not demonstrate the wisdom and sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[69]

The Court also noted that, "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[70] Subsequent cases have emphasized the breadth of this power.

In *Village of Belle Terre v. Boraas*,[71] the Court upheld an ordinance which restricted land use to single-family dwellings, and defined "family" in such a way as to allow to live together only persons related by blood, marriage or adoption or two unrelated persons. The Court recognized that the ordinance, for example, permitted a group of ten (10) related individuals to live together but prohibited from living together a group of six (6) unrelated individuals, but concluded that "every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."[72]

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[69] 272 U.S. at 395.

[70] *Id.* at 388.

[71] 416 U.S. 1 (1974).

[72] *Id.* at 8 (footnote omitted).

In *Young v. American Mini Theatres, Inc.*,[73] the Court sustained a challenge, based on the first amendment and the due process and equal protection clauses, to an ordinance requiring adult motion picture theaters to be dispersed throughout Detroit, rather than allowing them to be located in a concentrated area. In a comment which is germane to this case, the Court observed:

> *[W]e have no doubt that the municipality may control the location* of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.[74]

Even in those rare instances in which the Court has held unconstitutional zoning or other land use ordinances,[75] it has recognized that the power of states and cities in this area is great. Recently, for example, in *Schad v. Borough of Mount Ephraim*,[76] the Court reiterated that "[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities."[77] While the Court struck down the ordinances involved in *Schad* and ordinances involved in a few other suits, it did so not because the matters addressed by the legislation were improper subjects of regulation, but because the legislation

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[73]427 U.S. 50 (1976).

[74]*Id.* at 62 (emphasis added).

[75]*E.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Moore v. City of East Cleveland, 431 U.S. 494 (1976).

[76]452 U.S.61 (1981).

[77]*Id.* at 68.

infringed upon "fundamental rights", e.g., freedom of expression [78] and sanctity of family life, [79] which rights, on balance, outweighed the interests advanced by the legislation as drafted. However, as discussed at 17 n. 68 *supra,* no "fundamental rights" are at issue in this suit.

Among the specific concerns which the Court has held warrant the exercise of a legislatives body's police power are the danger of fire,[80] the avoidance of aesthetic harm and the preservation of property values[81] and the elimination of unhealthy places[82]. This is not to suggest, however, that there is a narrow range of concerns which justify action by a legislative body. Rather, as the Court concluded in *Berman v. Parker:*[83]

> The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.[84]

To the extent that a court reviews an action taken by a

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[78]Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1982); *Schad.*

[79]Moore v. City of East Cleveland, 431 U.S. 494 (1976). The Court distinguished the ordinance involved in *Village of Belle Terre* from the ordinance involved in *Moore* on the grounds that in *Moore* the ordinance prohibited certain related individuals from living together, while in *Village of Belle Terre* the ordinance allowed all related individuals to live together. *Id.* at 489-99.

[80]*Euclid,* 272 U.S. at 388.

[81]*Penn Central,* 438 U.S. at 129; Berman v. Parker, 348 U.S. 26, 33 (1954).

[82]Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[83]348 U.S. 26 (1954).

[84]*Id.* at 33.

legislative body, that body's acts are presumed valid,[85] and doubts are resolved in its favor"[86]. Accordingly, the party challenging a statute or ordinance has the burden of establishing that, under no circumstances, may the considerations which led to the legislature's actions be conceived as true, and that, therefore, the legislature has acted unreasonably and arbitrarily."[87] Further, because the legislature is presumed to know the needs of the people,"[88] even if a court were to disagree with the judgment of a legislature, it may not substitute its judgment for that of the legislature."[89] When applied to the facts of this case, the above holdings and their supporting rationales resolve unequivocally that Ordinances 58 and 78 were a proper exercise of the city council's police power, and that the petitioners have failed to meet their burden of showing that the council acted unreasonably and arbitrarily.

Mobile homes are not the same as site-built houses. They are subject to different construction standards,[90] and, in Brookside's experience, mobile homes have presented problems that

[85]Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 670 (1981); Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959); Townsend v. Yeomans, 301 U.S. 441, 450 (1937); *see* Minnesota v. Clover Leaf Creamery Co. 449 U.S. 456, 464 (1981).

[86]*Euclid,* 272 U.S. at 388.

[87]Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (quoting Vance v. Bradley 440 U.S. 93, 111 (1979)); *Goldblatt,* 369 U.S. at 596; United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938).

[88]Townsend v. Yeomans, 301 U.S. 441, 451 (1937).

[89] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981); Ferguson v. Skrupa, 372 U.S. 726, 729 (1963); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 394-95 (1940); Townsend v. Yeomans, 301 U.S. 441, 451 (1937).

[90]Site-built houses in Brookside must be constructed in accordance with the Southern Standard Building Code, S.F., *supra* note 1, at 27 (testimony of Mayor Boehm), while, after 1976, mobile homes must be constructed, in accordance with the NMHCSSA and the regulations promulgated pursuant thereto, 24 C.F.R. § 3280.1-3280.904 (1982), *as amended at* 47 Fed. Reg. 28, 092 (1982).

site-built houses have not presented. Accordingly, without excluding mobile homes from Brookside, the city council has determined that mobile homes only may be located in mobile home parks.

As discussed at 5 *supra*, and as noted in the decision by the Texas Supreme Court,[91] among the considerations behind Brookside's locational requirements was the higher incidence of fire among the mobile homes in Brookside. This problem has been exacerbated because Brookside's water is supplied only by individual wells, and because Brookside only has a small, volunteer fire department. As a result, the fire department has been unsuccessful in fighting mobile home fires.[92] Additionally, the city council was concerned that, if mobile homes could be located outside of mobile home parks, large numbers of mobile homes, each requiring separate water and sewage facilities, would be placed on plots of land too small adequately to accommodate these facilities. By requiring mobile homes to be located in mobile home parks, however, the possibility exists of providing centralized water and sewage facilities for all of the mobile homes in the respective mobile home parks.[93] Finally, the city council determined that, largely due to their relatively rapid rate of deterioration, mobile homes scattered throughout Brookside would be aesthetically harmful and would lower property values.

Petitioners do not claim that the above considerations are beyond the scope of the public health, safety, morals or general welfare, but, rather, contend that Ordinances 58 and 78 are unrelated to these goals, and are, therefore, arbitrary and unreasonable."[94] With respect to the concerns for fire and the lack of sewage facilities, petitioners support their argument by contending that "no studies were performed, no experts

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[91]633 S.W. 2d at 793.

[92]S.F., supra note 1, at 48-49.

[93]*See* Ordinance 58, § II(B)(4)(d).

[94]Petition at 10-11, 23.

solicited and no committees formed to review or evaluate the problems prior to the enactment of the ordinances."[95] This assertion, however, rings hollow in light of this Court's holdings that the burden is on the party challenging an act to show that it is unreasonable, arbitrary and not reasonably related to the goals sought to be achieved. Further, in *Townsend v. Yeomans*,[96] the Court concluded that "[t]here is no principle of constitutional law which nullifies action taken by a legislature, otherwise competent, in the absence of a special investigation . . . . Whether or not special inquiries should be made is a matter for the legislative discretion."[97] Additionally, even assuming experts or special studies would have proven informative, petitioners offered no experts or studies of their own to rebut the testimonies concerning the incidences of fire among Brookside's mobile homes or the absorption properties of Brookside's soil and the constraints thereby imposed.

With respect the aesthetic considerations, petitioners rely exclusively on the testimony of only one person, Mayor Boehm, who, according to petitioners, "had trouble differentiating between mobile homes and site-built structures in photographs."[98] Apart from the inherent limitations of a two dimensional representation of a three dimensional object, the photographs bore no relation either to Brookside's mobile homes or to its site-built houses. Instead, petitioners used pictures of mobile homes taken at the direction of the president and general counsel of the Texas Manufactured Housing Association for inclusion in a booklet prepared by the Association.[99] In view of the obvious interest of the Association in portraying mobile homes in the most commercially advantageous light possible, the usefulness of these pictures is, at best, dubious.

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[95] *Id.* at 10.

[96] 301 U.S. 441 (1937).

[97] Id. at 451.

[98] Petition at 21.

[99] S.F., *supra* note 1, at 118-19. The record does not reveal the source of the pictures of the site-built houses.

Without providing any information as to cost or other consequences, petitioners next attack Ordinances 58 and 78 by contending that there were options available to the city council other than the option of requiring mobile homes to be located in mobile home parks.[100] Even assuming the viability of these options, choices between options are the exclusive province of the duly elected legislative body,[101] which here has opted for requiring mobile homes to be located in mobile home parks. Such a determination, even where "fairly debatable," must be upheld.[102]

Petitioners also attack Ordinances 58 and 78 because they are the only zoning or land-use ordinances for Brookside.[103] First, petitioners claim that the ordinances are arbitrary and unreasonable because, while prohibiting placement on their land of a mobile home, the absence of other zoning restrictions leaves open the possibility that petitioners could erect on their land a high rise apartment complex or other commercial venture. There is, however, a simple explanation why Brookside does not have a comprehensive zoning scheme. As discussed at 3 *supra*, Brookside is presently a "bedroom" community, and has no industry. As a result, there has been no need for it to zone for nonexistent property uses.

Second, petitioners claim that, under Tex. Rev. Civ. Stat. Ann. art. 1011c (Vernon 1963), Ordinances 58 and 78 are invalid because the Texas statute requires a comprehensive zon-

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[100]Petition at 18-19. Among the options proposed by petitioners was an ordinance "requiring all structures to be built with certain kinds or types of exterior siding materials, roofing, etc. . . ." *Id.* at 19. One wonders if, following on petitioners' suggestion, petitioners would object to a requirement that the exteriors of all residences, including mobile homes, be composed of brick.

[101]*See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469-70 (1981); Ferguson v. Skrupa, 372 U.S. 726, 729 (1963); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 394-95 (1940); *Townsend*, 301 U.S. at 451.

[102]*Euclid*, 272 U.S. at 388.

[103]Petition at 11, 17.

ing scheme or no scheme at all. Petitioners, however, ignore the Texas Supreme Court's holding on this issue: "Because Brookside Village, a general law city, has no comprehensive zoning plan, the ordinances in question do not come under article 1011a, which embodies legislative authorization for zoning. *See* Tex. Rev. Civ. Stat. Ann. art. 1011c . . . . A city, however, may regulate land use under its general police power."[104] As this Court repeatedly has held, the interpretation of state law by the highest court of that state is controlling and binding upon this Court.[105] Petitioners' argument, therefore, must fail.

Petitioners next contend that Ordinances 58 and 78 deny them equal protection because their mobile home, unlike earlier mobile homes, was manufactured in accordance with the Manufactured Home Construction and Safety Standards (the "HUD regulations")[106] it is entitled to the same treatment as site-built houses.[107] This argument was resolved as early as *Euclid* wherein the Court observed:

> The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class.[108]

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[104]633 S.W. 2d at 793 n.4.

[105]*E.g.*, City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 674 n.9 (1976); Eisenstadt v. Baird, 405 U.S. 438, 442 (1972).

[106]24 C.F.R. § 3280.1-3280.904 (1982), *as amended at* 47 Fed Reg. 28, 092 (1982).

[107]Petition at 5-6, 25.

[108]272 U.S. at 388-89.

This quotation is particularly appropriate to this case in view of the fact that the majority of mobile homes in Brookside were not manufactured in accordance with the HUD regulations,[109] and, as discussed at 21 n. 90 *supra*, even those that were are not subject to the same construction standards as site-built houses. In any event, the Texas Supreme Court has set forth the proper course to be followed for any change in Brookside's policy toward mobile homes: "It is possible that the general improvement in appearance and quality of manufacture of mobile homes will persuade municipalities to alter ordinances similar to the one before us. Such changes, however, should be made through the legislative, not judicial, process."[110]

The Brookside city council has not excluded mobile homes from Brookside, but only has required them to be placed in mobile home parks. Based on a variety of decisions by this Court and the record below, there is no doubt that this requirement was based on concerns for the health, safety, morals and general welfare of Brookside's citizens.[111] As such, the ordinances

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[109]City of Brookside Village v. Comeau, 633 S.W. 2d at 795 n.6.

[110]*Id.* at 795.

As the Texas Supreme Court also noted, its decision upholding locational restrictions on mobile homes is the majority rule. *Id.* at 794. Most recently, for example, the Maine Supreme Judicial Court upheld an ordinance requiring mobile homes to be placed in mobile home parks. Stewart v. Inhabitants of Durham, No. 81-252 (Maine Oct. 14, 1982) (a copy of this decision is reprinted in Appendix C, at 60a.) Numerous decisions of other state courts have upheld similar restrictions. *E.g.*, Mathews v. Fayette County, 233 Ga. 220, 210 S.E.2d 758 (1974); City of Colby v. Hurtt, 212 Kan. 113, 509 P. 2d 1142 (1973); State v. Larson, 292 Minn. 350, 195 N.W. 2d 180 (1972); Town of Londonderry v. Faucher, 112 N.H. 454, 299 A.2d 581 (1972); Gravatt v. Borough of Latrobe, 44 Pa. Commw. Ct. 47, 404 A.2d 729 (1979); Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 586 P.2d 860 (1978). *Contra* Robinson Township of Knoll, 410 Mich. 293, 302 N.W.2d 146 (1981).

[111]That mobile homes continue to present safety problems not presented by site-built houses is evident from a November 4, 1982 article in the Austin American Stateman newspaper, a copy of which is

represent a proper exercise of the city council's police power. Petitioners have failed to meet their heavy burden of showing that the ordinances were unreasonable and arbitrary, and could not be related reasonably to the public health, safety, morals or general welfare.

III. Congress, Through the National Manufactured Housing Construction and Safety Standards Act of 1974, Has Not Attempted To Pre-Empt the Power of States and Cities To Legislate the Location of Mobile Homes.

As their last gasp, petitioners contend that section 5403 of the NMHCSSA has pre-empted Ordinances 58 and 78.[112] This argument is frivolous, as readily may be seen from even a cursory review of the NMHCSSA and its legislative history, as well as from consideration of the tenth amendment implications.

In *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*,[113] the Court reiterated that "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion or that the

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reprinted in Appendix D, at 70a, reporting a storm in Port Isabel and South Padres Island, Texas, which uprooted and blew into canals a total of approximately twenty-six (26) mobile homes.

[112]Petition at i, 25-29. In their Questions Presented, petitioners allege that the NMHCSSA has pre-empted state regulation of mobile homes, but in their Reasons for Granting the Petition petitioners contend that both the NMHCSSA and the TMHSA have pre-empted Ordinances 58 and 78. Accordingly, petitioners' position is unclear. In any event, however, the Texas Supreme Court ruled that the entry of the state into an area of legislation did not pre-empt automatically a city from legislating in that area, and that Ordinances 58 and 78 are compatible with the TMHSA. City of Brookside Village v. Comeau, 633 S.W.2d at 796. As discussed at 25 *supra*, this interpretation of state law is controlling. Therefore, the only remaining issue is whether the NMHCSSA has pre-empted the ordinances.

[113]450 U.S. 311 (1981).

Congress has unmistakably so ordained.' "[114] Even where a federal statute or regulation pre-empts state law, it does so only to the extent the state law is in conflict with the federal statute or regulation.[115]

As set forth in the legislative history of the NMHCSSA, the purposes to be served by the Act were "to reduce injuries, deaths, insurance costs and property damage from mobile home accidents and to improve the quality and durability of mobile homes."[116] Accordingly, the HUD regulations were issued to set construction and installation standards in order to improve the quality of mobile homes relative to the quality of mobile homes manufactured prior to implementation of the HUD regulations. However, Ordinance 58 pertains only to mobile home parks and the requirements therefor, and Ordinance 78, the ordinance which is the specific subject of the instant suit, only pertains to the location of mobile homes. Therefore, Ordinance 58, as amended by Ordinance 78, in no way conflicts with the NMHCSSA or the HUD regulations, and petitioners point to no provision indicating otherwise.[117]

Petitioners, attempt to obfuscate the flaws in their argument by contending that "the alleged public purpose *goals* of this City have been pre-empted."[118] Even assuming this were a proper application of the pre-emption standard, the NMHCSSA was

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[114]*Id.* at 317 (quoting Florida Lime & Advocado Growers v. Paul, 373 U.S. 132, 142 (1963)).

[115]Maryland v. Louisiana, 451 U.S. 725, 747 (1981).

[116]S. Rep. No. 693, 93rd Cong., 2d Sess. 143, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4273, 4408. *See also* 42 U.S.C. §5401 (Supp. V 1981) (adopting almost word-for-word the legislative history's declaration of purpose).

[117]Even if parts of Ordinance 58 could be seen as conflicting with the NMHCSSA or the HUD regulations, that still would not provide a basis for invalidating the locational requirements of Ordinance 78, particularly since Ordinance 58, § XXIV(C) specifically provides for the severability of any provision held to be invalid.

[118]Petition at 28 (emphasis added).

not an attempt to make mobile homes the equivalent of site-built houses. Rather, Congress simply was seeking to upgrade the quality of mobile homes. The Brookside city council was motivated by concerns for the differences betwen mobile homes and site-built houses, and not the differences between pre-HUD regulation and post-HUD regulation mobile homes.

Equally important to the pre-emption issue are the implications of petitioners' argument on the tenth amendment to the Constitution. As discussed previously, the sole portion of the ordinances with which petitioners are concerned is the requirement that mobile homes be located in mobile home parks. In *National League of Cities v. Usery*,[119] the Court held that the federal government could not "operate to directly displace the States' freedom to structure integral operations of traditional governmental functions."[120] No one seriously may doubt that zoning or other land-use planning is an area of traditional state and local government function.[121] To suggest, therefore, that Congress may pre-empt a city's zoning or other land-use determinations is to suggest that Congress may displace a traditional state and local government function. There is no basis whatsoever for petitioners' suggestion that Congress, through the NMHCSSA, sought to wield its power in such a fashion.

The NMHCSSA has not pre-empted either the ordinance providing for the location of mobile homes or the ordinance setting forth the requirements for mobile home parks.

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[119]426 U.S. 833 (1976).

[120]*Id.* at 852.

[121]Warth v. Seldin, 422 U.S. 490, 508 n. 18 (1975); *see Penn Central*, 438 U.S. at 129; *Village of Belle Terre*, 416 U.S. at 8-9; *Euclid*, 272 U.S. at 386-90.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully Submitted,

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APPENDIX A

Findings of Fact, Conclusions of Law, Judgment and Orders of the District Court in *Comeau v. City of Brookside Village*, No. 78-F2046 (Dist. Ct. Tex.).

1. Findings of Fact and Conclusions of Law.

No. 78-F2046

IN THE DISTRICT COURT OF
BRAZORIA COUNTY, TEXAS
300TH JUDICIAL DISTRICT

HOMER N. COMEAU and HAZEL A. COMEAU

VS.

CITY OF BROOKSIDE VILLAGE, ET AL.,

FILED
MAY 9, 1980

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above captioned cause came on for trial before the Court without a jury on February 11, 1980. All parties and their attorneys were present. After considering the pleadings, the evidence and the argument of counsel, the Court, in response to a request from Plaintiffs, HOMER N. COMEAU and HAZEL A. COMEAU, makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Ordinance 58 and Ordinance 78 of the City of Brookside Village were duly passed and in effect prior to Plaintiffs' purchase of their mobile home.

2. Plaintiffs' Fairway Doublewide mobile home is a mobile home as defined in the city ordinances of Brookside Village.

3. Plaintiffs' placement of their mobile home on their property within the limits of the City of Brookside Village was a violation of Ordinances 58 and 78 of the City of Brookside Village.

4. The City of Brookside Village has no public sewage system.

5. Water is supplied to Brookside Village by means of private water wells.

6. The lack of municipal water and sewage systems creates a potential health hazard for Brookside Village.

7. Ordinances 58 and 78 of the City of Brookside Village bear a substantial relationship to the public health, safety and welfare of the residents of Brookside Village.

CONCLUSIONS OF LAW

1. Ordinances 58 and 78 of the City of Brookside Village are valid city ordinances.

2. Ordinances 58 and 78 of the City of Brookside Village are constitutional.

3. Ordinance 58 and 78 of the City of Brookside Village do not represent an abuse of municipal discretion.

4. Ordinances 58 and 78 of the City of Brookside

Village represent a valid exercise of the police power of municipalities.

Signed this 9th day of May, 1980.

Tom Kenyon
Judge

2. Judgment.

No. 78-F-2046

IN THE DISTRICT COURT OF
BRAZORIA COUNTY, TEXAS
300TH JUDICIAL DISTRICT

HOMER N. COMEAU and HAZEL A. COMEAU

VS.

CITY OF BROOKSIDE VILLAGE, ET AL.,

FILED
MARCH 4, 1980

JUDGMENT

On the 11th day of February, 1980, came on to be heard the above entitled and numbered cause and HOMER N. COMEAU appeared in person for the Plaintiffs and by his attorney of record and announced ready for trial, and THE CITY OF BROOKSIDE VILLAGE, Defendant appeared through its Mayor Louis Boehm and by its attorney of record and announced ready for trial and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that the City Ordinance No. 58 and City Ordinance No. 78 of Defendant, CITY OF BROOKSIDE VILLAGE, are constitutional, and further the Plaintiffs should remove their mobile home from its unauthorized location.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that City Ordinance No. 58 and City Or-

dinance No. 78 of Defendant, CITY OF BROOKSIDE VILLAGE, are constitutional;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs take nothing by this suit and that Defendants be in all things discharged; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED by the Court that Plaintiffs remove their mobile home from its unauthorized location within 60 days from the date this Court's judgment becomes final.

All costs of court are taxed against the Plaintiffs for which let execution issue. All other relief not expressly granted herein is denied.

SIGNED this 4th day of March, 1980.

Tom Kenyon
Judge

APPROVED AS TO FORM
AND SUBSTANCE:

By: /s/ William E. Kuhlman
William E. Kuhlman
3616 Preston Road
Pasadena, Texas 77505
947-1670
State Bar No.: 11756500
ATTORNEY FOR DEFENDANT

APPROVED AS TO FORM ONLY:
/s/ John A. Wright, Jr.
John A. Wright, Jr.
777 South Post Oak Road
Suite 990
Houston, Texas 77056
871-9542
State Bar No.: 22043500
ATTORNEY FOR PLAINTIFFS

3. Order Granting Temporary Injunction.

No. 78-F2046

IN THE DISTRICT COURT OF
BRAZORIA COUNTY, TEXAS
300TH JUDICIAL DISTRICT

HOMER N. COMEAU and HAZEL A. COMEAU

VS.

CITY OF BROOKSIDE VILLAGE, ET AL.,

FILED
OCTOBER 30, 1978

ORDER GRANTING TEMPORARY INJUNCTION

On October 2, 1978, the Court heard and considered the application of HOMER N. COMEAU and HAZEL A. COMEAU, Plaintiffs, for a Temporary Injunction upon their verified petition, to which was attached a sworn affidavit in support of the Plaintiffs' allegations, and the Plaintiffs having appeared in person and by their attorney and the Defendant, after due notice, by and through their attorney of record, and the Court, having heard and considered the evidence and argument of counsel:

The Court finds and concludes that HOMER N. COMEAU and HAZEL A. COMEAU, Plaintiffs herein, will probably prevail on the trial of this cause; that the CITY OF BROOKSIDE VILLAGE, Defendant herein, has prior to the granting of this Temporary Injunction issued cita-

tions against Plaintiffs in regard to their possession, use or occupancy of their manufactured home on certain real property owned by Plaintiffs, located at 12700 Mykawa Road in the City of Brookside Village, and have also expressed their intention to have the manufactured home of Plaintiffs removed from within the boundaries of the City of Brookside Village.

That if Defendant carries out said intention, they will thereby alter the status quo and tend to make ineffectual a judgment in favor of Plaintiffs, in that Plaintiffs will be put to unnecessary expense, and further, Plaintiffs' property will be made ineffectual for its intended use as a homestead.

And that unless Defendant is deterred from carrying out said intention, Plaintiffs will be without adequate remedy at law in that irreparable injury and harm will occur to Plaintiffs, their family and their homestead, by the denial of their use of said property for its intended purposes.

IT IS, THEREFORE, ORDERED that the City of Brookside Village, its agents and employees, Defendants herein, be, and they hereby are, commanded forthwith to desist and refrain from the issuance of any citations or other legal notices which are intended to act as a punitive measure against Plaintiffs in regard to their posession, use or occupancy of their manufactured home on their real property located at 12700 Mykawa Road in the City of Brookside Village:

IT IS FURTHER ORDERED that said Defendants herein, be, and they are, commanded forthwith to desist and refrain from denying Plaintiffs the use and quiet possession of their manufactured home located on their real property at 12700 Mykawa Road in the City of Brookside Village.

The clerk shall forthwith, on the filing by Plaintiffs of the bond hereinafter required, and on approving the same according to law, issue a Temporary Injunction in comformity with the law and the terms of this order.

This order shall not be effective unless and until Plaintiffs execute and file with the clerk a bond, in comformity with the law, in the amount of One Thousand Dollars ($1,000.00).

Sign this 30th day of October, 1978.

/s/ G.P. Hardy
JUDGE PRESIDING

3. Temporary Restraining Order and Show Cause Order.

No. 78-F2046

IN THE DISTRICT COURT OF
BRAZORIA COUNTY, TEXAS
149TH JUDICIAL DISTRICT

HOMER N. COMEAU and HAZEL A. COMEAU
Plaintiffs

VS.

CITY OF BROOKSIDE VILLAGE, ET AL.,
Defendants

TEMPORARY RESTRAINING ORDER AND SHOW CAUSE ORDER

The hereinabove entitled and numbered cause, and the Plaintiffs' Application for a Temporary Restraining Order, without notice, was presented to and heard by the Court on the date set forth hereinbelow. The Plaintiffs appearing by and through their attorney, John A. Wright, Jr., and the Court, having considered the verified pleadings and the Affidavit of the Plaintiffs, finds that Plaintiffs are entitled to a Temporary Restraining Order, pending a hearing on the Application for a Temporary Injunction, for the reason that Plaintiffs show probable cause and irreparable harm and injury for which there is no adequate remedy at law; the Court further finds that a bond in the amount of ONE THOUSAND AND NO/100

($1,000.00) DOLLARS will fully and adequately protect the rights and interest of Defendants until said hearing. It is therefore,

ORDERED, on Plaintiffs executing and filing with the Clerk of this Court, a good and sufficient bond in the sum of ONE THOUSAND AND NO/100 ($1,000.00) DOLLARS conditioned that Plaintiffs will pay to Defendants any and all damages sustained if it shall be determined that Defendants have been wrongfully restrained pending the hearing on Application for Temporary Injunction, that Defendant City of Brookside Village, and its agents and employees, are enjoined and restrained from denying Plaintiffs the use and quiet possession of their manufactured home located on their real property at 12700 Mykawa Road in the City of Bookside Village, and it is further

ORDERED, that the City of Brookside Village, and its agents and employees, cease the issuance of any citations or other legal notices which are intended to act as a punitive measure against Plaintiffs in regard to their posession, use or occupancy of their manufactured home on their real property located at 12700 Mykawa Road in the City of Brookside Village, and if [sic] is further

ORDERED, that Defendants be directed to appear before this Court in the 149th District Courtroom in the County of Brazoria, Texas, at 9:00 o'clock, a.m. on October, 22nd, 1978, then and there to show cause, if any there be, why a temporary injunction should not issue against them enjoining and restraining Defendants from denying Plaintiffs the use and quiet possession of their manufactured home located on their real property at 12700 Mykawa Road in the City of Brookside Village, and further enjoining and restraining from denying, and re-

quiring Defendants to issue to Plaintiffs all permits and certificates which may be required and necessary for Plaintiffs to obtain utility building services at 12700 Mykawa Road, City of Brookside Village, Texas, and to occupy said premises until the final hearing or other disposition of this cause.

SIGNED on September 21, 1978, at 1:30 o'clock a.m.

/s/ Paul Ferguson
JUDGE PRESIDING

Entered on_____, 1978.

APPENDIX B

Constitution, Statute and Ordinances.

1. U.S. Const. amend. X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. Section 5401 of the National Manufactured Housing Construction and Safety Standards Oct of 1974, 42 U.S.C. §§ 5401-5426 (1976 & Supp. V 1981).

§ 5401. Congressional declaration of purposes

The Congress declares that the purposes of this chapter are to reduce the number of personal injuries and deaths and the amount of insurance costs and property damage resulting from manufactured home accidents and to improve the quality and durability of manufactured homes. Therefore, the Congress determines that it is necessary to establish Federal construction and safety standards for manufactured homes and to authorize manufactured home safety research and development.

3. **Brookside Village, Tex., Ordinance 78 (Apr. 18, 1974).**

ORDINANCE NO. 78

AN ORDINANCE AMENDING ORDINANCE NO. 58; REGULATING THE PARKING OF MOBILE HOMES; REGULATING THE CHANGE OR REPLACEMENT OF MOBILE HOMES; PROVIDING FOR EMERGENCY USE OF MOBILE HOMES; REQUIRING PERMITS FOR SUCH EMERGENCY USE; PROVIDING FOR A PENALTY FOR VIOLATION HEREOF; AND PROVIDING FOR AN EFFECTIVE DATE HEREOF.

BE IT ORDAINED by the Board of Aldermen of Brookside Village, Texas;

Section I. Subsections B and C of Section XVIII of Ordinance No. 58 is hereby deleted in its entirety, and is hereby amended to include the following provisions as set out herein.

Section II. Parking of mobile homes, camper buses, motor homes and camper trailers, for use as a residence, outside of a mobile home park shall be prohibited.

Section III. Mobile homes heretofore installed in compliance with the Ordinances of Brookside Village may remain in place, and continue to be used or occupied. Exchange, replacement, alteration, relocation or additions to mobile homes within Brookside Village is hereby prohibited, unless such move, replacement, alteration, relocation or addition is to or in a licensed mobile home park.

Section IV. The Board of Aldermen of Brookside Village, by a majority vote of its five (5) members, may grant to individuals the temporary use of mobile home, motor homes, camper busses, or camper trailers in the event of an emergency. An emergency shall only be loss of a permanent dwelling due to fire, flood or any other natural disaster. In the event any such application for

emergency temporary use of said mobile homes, motor homes, camper busses or camper trailers is granted by the Board of Aldermen, no such temporary use shall begin until:

A. A permit fee, to be established by the Board of Aldermen, is paid by the applicant.

B. A determination of the period of time such emergency use may continue, but in no event shall such period exceed thirty (30) days. However, each applicant may have his emergency permit extended for additional thirty (30) days periods. No permit shall be extended, or renewed, more than five times. All such extensions shall require a majority vote of the five (5) member Board of Aldermen.

C. The Board of Aldermen shall only grant an emergency permit for the express purpose of occupying a mobile home, motor home, camper bus or camper trailer as a residence, only while repairing, remodeling or replacing a permanent residence.

D. Any such emergency permit granted shall require the applicant to locate his temporary mobile home, motor home, camper bus or camper trailer upon the same lot, or parcel of real estate, as the permanent residence that is being repaired, remodeled or replaced.

Section [V] VI. An existing mobile home that is destroyed by fire, explosion, flood, or other natural disaster, may be replaced, if such replacement is of the same size, length, width and weight as the one destroyed.

Section [VI] V. This Ordinance shall become effective from and after the date of its passage, and after all applicable laws of the State of Texas, if any, have been complied with.

Section [VII] VI. Any person violating this Ordinance is guilty of a misdemeanor, and upon conviction shall be fined not less than Ten Dollars ($10.00) and not more than One Hundred-Dollars ($100.00). Each day a violation of this Ordinance continues shall be a separate offense.

Passed and approved this 18th day of April, 1974.

George Carter
MAY[illegible]

ATTEST:
/s/ Aurora C. Rodriguez
CITY SECRETARY

4. Brookside Village, Tex., Ordinance 58 (Aug. 6, 1970).

ORDINANCE NO. 58

AN ORDINANCE OF BROOKSIDE VILLAGE, TEXAS, FOR THE PURPOSE OF REGULATING THE CONSTRUCTION, OPERATION AND MAINTENANCE OF MOBILE HOME PARKS IN THE VILLAGE OF BROOKSIDE; REQUIRING A CONSTRUCTION PERMIT FOR THE CONTRUCTION, ALTERNATION OR EXTENSION OF MOBILE HOME PARKS AND PROVIDING FOR INSPECTIONS AND FEES; REQUIRING A LICENSE FOR THE OPERATION OF A MOBILE HOME PARK AND PROVIDING FOR INSPECTIONS AND FEES; REQUIRING THAT AN ANNUAL, A SEMI-ANNUAL OR A TEMPORARY PARKING PERMIT BE OBTAINED FOR ANY MOBILE HOME OR TRAVEL TRAILER OCCUPYING A STAND IN A MOBILE HOME PARK AND PROVIDING FOR INSPECTIONS AND FEES; PROVIDING FOR APPEALS; ESTABLISHING STANDARDS FOR THE CONSTRUCTION, OPERATION AND MAINTENANCE OF MOBILE HOME PARKS; PROVIDING THAT OWNERS OR OPERATORS OF EXISTING MOBILE HOME PARKS SHALL BE PERMITTED A PERIOD OF TIME AS HEREIN PROVIDED TO OPERATE A MOBILE HOME PARK WITHOUT OBTAINING A LICENSE: REGULATING MOBILE HOMES AND TRAVEL TRAILERS OUTSIDE OF MOBILE HOME PARKS: CONTAINING A REPEALING CLAUSE AND A SEVERABILITY CLAUSE: CONTAINING A PENALTY PROVISION AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF ALDERMEN
OF BROOKSIDE VILLAGE, TEXAS:

MOBILE HOME PARKS

I. **DEFINITIONS** – The following terms, phrases and words as used in this Ordinance shall have the following respective definitions:

A. *Annual parking permit* means a permit required for any mobile home or travel trailer which is occupying a stand in a mobile home park and which permit is valid for the period from January 1 through December 31 of the year of issuance.

B. *Board* means the Board of Aldermen.

C. *Building Official* is the Village Inspector or duly authorized representative.

D. *Cash* means United States currency or coin or a cashier's check or certified check or a postal money order.

E. *City* means Brookside Village, Texas.

F. *Construction permit* means the permit required for the construction, alteration or extension of any mobile home park in the City.

G. *Construction permitee* means the person to whom a construction permit has been issued.

H. *Current parking permit* means the person to whom a construction permit has been issued.

I. *Expandable room* means an enclosed or a semi-enclosed room or roofed portion which expands outward from the basic mobile home by means of rollers, hinges or other devices or arrangements, but which is designed as a structural portion of the mobile home and which is carried on, or within, the mobile home while travelling. Also includes permanent additions to mobile homes.

J. *Health Officer* means the Village or County Sanitarian.

K. *Label* means a metal inspection label or plate which has been permanently affixed by the manufacturer or by an approved testing agency to a mobile home or travel trailer or to equipment used in connection therewith and which contains a serial number, if re-

quired, the specifications of the vehicle or the equipment to which it is attached and which refers to any standards that have been met in the construction of such vehicle or equipment.

L. *License* means a mobile home park operator's license.

M. *Licensee* means the person to whom a mobile home park operator's license has been issued.

N. *Mobile Home* means a portable vehicle constructed on a chassis and which has been designed so that it may be occupied and used without a permanent foundation. For the purpose of this Ordinance, a mobile home shall mean a single family dwelling unit suitable for year-round occupancy and which has provision for electrical and water connections and which provides for waste disposal in compliance with the Plumbing Code requirements for dwellings. Such vehicle shall be eligible for registration and licensing by the State of Texas for operation on the public streets and highways, and be fourteen (14) feet in length or longer.

O. *Mobile home lot* means a parcel or tract of land for the placement of a single mobile home and the exclusive use of its occupants and which is located in a mobile home subdivision approved by the Planning Commission of the Village. This is to be distinguished from a mobile home stand and site located within a mobile home park.

R. *Mobile home stand* means that part of a mobile home park which has been improved for the placement of the mobile home including all required appurtenant structures and having provision for available utility connections.

S. *Occupant* means the person or persons who occupy a mobile home or travel trailer in a mobile home park. *Owner* means the owner or lessee, whether one or more, of the premises on which a mobile home park is operated when such person is not a licensee.

T. *Overnight parking* means the use of a mobile home park for a period not to exceed seven (7) days by a travel trailer or mobile home, provided that if said use exceeds seven (7) days, a valid annual, semi-annual, or temporary parking permit is required and the beginning date shall be the initial date of occupancy of the mobile home park. No permit or fee shall be required by the Village for the temporary use of a mobile home park for a period of seven (7) days or less.

U. *Parking permit* shall mean an annual or semi-annual parking permit.

V. *Person* means a natural person, his heirs, executors, administrators or assigns, and shall also include a firm, partnership, or corporation, its successors or assigns, or the agent of any of the aforesaid.

W. *Semi-annual parking permit* means a permit required for any mobile home or travel trailer which has been placed upon a stand in a mobile home park and which is valid for the period from January 1 through June 30 or for the period from July 1 through December 31 of the year of issuance.

X. *Service building* means a structure housing toilet facilities, lavatories, bathing facilities, and such other facilities, as may be required or permitted under the provisions of this Ordinance and which is used in connection with the operation of a mobile home park.

Y. *Sewer connection* means the connection consisting of the pipes, fittings and appurtenances from the drain outlet of the mobile home or travel trailer to the inlet of the corresponding sewer riser pipe or the sewerage system serving the mobile home park.

Z. *Sewer riser* means that portion of the pipe of the sewer lateral which extends vertically to the ground elevation and terminates at each mobile home stand.

AA. *Temporary parking permit* means a permit which may be used in lieu of an annual or semi-annual parking permit and which is valid for thirty (30) days from the date of issuance.

BB. *Travel trailer* means a portable vehicle built on a chassis and designed as a temporary dwelling for travel, recreation and vacation use and which has been permanently identified by the manufacturer. When such a vehicle has been equipped by the manufacturer for use on public streets and highways, the body of such vehicle shall not exceed eight (8) feet in width, but may be of any length, provided its gross weight does not exceed 4,500 pounds, or a travel trailer may be of any height, provided its length does not exceed fourteen (14) feet, exclusive of the tongue. The term *travel trailer* shall also be deemed to include all other portable contrivances other than mobile homes used or intended to be used generally for living and sleeping quarters and which may be moved under its own power, towed, or transported by another vehicle.

CC. *Utilities* means the telephone, water, sewage, gas or electrical distribution system, which are

available for connection to mobile homes or travel trailers in mobile home parks.

DD. *Utility connection* means the connection of available utilities in a mobile home park to a mobile home or travel trailer placed on a mobile home stand in a mobile home park.

EE. *Vehicle* means a mobile home or a travel trailer unless the context in which the word is used indicates that another meaning is intended.

FF. *Water connection* means the connection of the pipes, fittings and appurtenances from the water riser pipe to the water inlet pipe for the water distribution system of a mobile home or travel trailer.

II. CONSTRUCTION PERMIT REQUIRED FOR MOBILE HOME PARK

A. It shall be unlawful for any person to construct, alter or extend any mobile home park within the corporate limits of the Village of Brookside, unless he shall first have obtained a mobile home park construction permit therefor from the Village.

B. Application for such permit shall be made to the Planning Commission in triplicate and the following information and items shall be furnished:

1. Name and address of applicant.
2. Interest of the applicant in the mobile home park.
3. Location and legal description of the mobile home park.
4. Complete engineering plans and specifications in triplicate for the proposed park showing:

a. The area and dimensions of the trace of land.
b. A plat or map of the proposed mobile home park showing the number, location and size of all mobile home sites, stands, locations and widths of roadways and walkways, service buildings and other proposed structures.
c. The location of water and sewer lines and riser pipes.
d. Plans and specifications for the water supply, including fire plugs, and refuse and sewage disposal facilities.
e. Plans and specifications for all buildings to be constructed within the mobile home park.
f. The location and details of lighting and electrical systems.
g. Surface drainage plan.

C. A separate permit shall be required for the building, electrical, plumbing and driveway-sidewalk and other permits when required.

D. Any person who has been denied a mobile home park permit, may appeal such denial by following the same procedure provided for an appeal from a license denial, revocation or suspension by the Building Official.

III. MOBILE HOME PARK OPERATOR'S LICENSE REQUIRED

A. It shall be unlawful to establish, maintain or operate a mobile home park without first securing a mobile home park operator's license therefor.

B. As an exception to the requirement for a license,

and as limited hereinafter, the owner or operator of an existing mobile home park will be permitted to continue operation of such park for a period of six (6) months from the effective date of this Ordinance without obtaining a license therefor upon the following conditions:

1. He shall make application for a license, paying the required fee therefor within ninety (90) days from the effective date of this Ordinance.

2. Upon receipt of his application, an investigation and inspection will be made of the existing mobile home park.

3. The applicant will not be required to make any modifications or changes in his existing mobile home park if the variance from the requirements of this ordinance is not dangerous to life, health and safety of the public.

4. The Building Official shall furnish to the applicant, in writing, a list of any necessary changes or modifications in the existing mobile home park, and it shall be the duty of the applicant to commence making such changes in good faith.

C. For good cause, the Building Official may extend the period for completion of such necessary changes or modifictions for one additional period of six (6) months, but in no event will an existing mobile home park be permitted to continue operations, if, at the end of one (1) year from the effective date of this Ordinance, the owner thereof has not obtained a mobile home park license. The owner or operator of an existing mobile home park license. The owner or operator of an existing mobile home park shall be entitled to ap-

peal any required changes or modifications and any denial of an extension of time for such changes or modifications to the Planning Commission by following the procedure that is provided for appeals for license denials, revocations or suspension by the Building Official, but the Planning Commission shall have no authority to extend the period for completion beyond one (1) year from the effective date of this Ordinance.

D. It shall be unlawful for any mobile home park owner or operator to continue operating any mobile home park unless he shall have made application for a mobile home park operator's license as provided herein within ninety (90) days from the effective date hereof.

E. It shall be unlawful for any mobile home park occupant to continue occupying a mobile home or a travel trailer located in a mobile home park which has not been duly licensed by the Village or the owner or operator which has not, within ninety (90) days from the effective date of this Ordinance, made application for a mobile home park operator's license. A ten-day written notice of such failure of the owner or operator of an existing mobile home park shall be given to the occupants of such mobile home park and the failure, refusal or neglect of such occupant or occupants to remove their mobile home or travel trailer therefrom, or to cease occupying such mobile home or travel trailer within said ten-day period, shall constitute an offense.

F. Licenses shall be valid for a period of one (1) year beginning on July 1 of each year and shall be renewable annually during the month of June. A non-

refundable license application investigation fee of $25.00 shall accompany each application for license, provided such investigation fee will be allowed as a credit upon the license if it is granted. The license fee and annual license renewal fee shall be determined by the following fee schedule:

2 through 15 mobile home stands	$ 25.00
16 through 40 mobile home stands	$ 50.00
41 through 60 mobile home stands	$ 75.00
61 through 80 mobile home stands	$100.00
Each stand in excess of 80	$ 1.00 each

IV. PERMITS

A. It shall be unlawful for any person to occupy a mobile home or travel trailer in a mobile home park without first securing a parking permit therefor except that no permit will be required for the use of a mobile home park for a period of seven (7) days or less.

B. It shall be unlawful for any person to occupy a mobile home or travel trailer in a mobile home park unless such vehicle has first been connected to the approved utilities exclusive of telephones available in such park.

C. It shall be unlawful for the occupant of a mobile home or travel trailer to connect or permit such vehicle to be connected to the available utilities in a mobile home park or for such vehicle to remain so connected, without first securing a parking permit except that no permit will be required for the use of a mobile home park for a period of seven (7) days or less.

D. It shall be the responsibility of a mobile home park licensse, his agents or employees, to notify the Village of Brookside, in writing, when any mobile home or travel trailer is to be connected to the available utilities in the mobile home park operated by the licensee. Failure to perform such notification shall constitute a misdemeanor under the terms of this Ordinance.

E. An annual parking permit shall be valid for the period from January 1 through December 31 of the year of issuance. A semi-annual parking permit shall be valid for the period from January 1 through June 30, or July 1 through December 31 of the year of issuance. An annual or a semi-annual parking permit may be issued only by the Village and such permits may not be issued by licensees or mobile home dealers. Application for an annual parking permit or a semi-annual parking permit shall be made to the Building Official. A cash fee of $18.00 shall be paid for an annual permit and no proration shall be allowed for an elapsed period of time in the year of issunce. A cash fee of $10.00 shall be paid for a semi-annual parking permit. Applications may be made by mail to the Building Official.

F. A temporary parking permit may be used in lieu of an annual or semi-annual parking permit and it shall be valid for a period of thirty (30) days from the date of issuance. A temporary parking permit may be obtained from the Building Official, in the same manner as an annual or semi-annual parking permit upon payment of a $5.00 cash fee.

G. A parking permit may be assigned in connection with the sale, lease, or renting of a mobile home or travel trailer or a permit holder may transfer a parking permit from one vehicle to another. Application for such assignment or transfer shall be made to the Building Official who shall furnish the necessary forms. A service charge of $2.00 will be made for each transfer or assignment. This provision is not to be construed as requiring an assignment of a parking permit from the seller in whose name the parking permit has been issued to the purchaser, provided the seller has delivered to the purchaser his receipt for such parking permit.

H. If the Building Official is furnished satisfactory proof that a parking permit which has been issued has been lost, destroyed or defaced, he may issue a replacement permit for the unexpired term of such permit, upon payment of a service charge of $2.00. The Building Official may prescribe such forms and requirements as he may, from time to time, find necessary to insure that no replacement parking permit is improperly issued.

I. The Building Official is hereby authorized to prescribe the form of parking permits and to require that additional relevant information be furnished, either in the application for parking permits, upon the face or back of the parking permit, or upon the receipt therefor. The Building Official is further hereby authorized to designate the place on or within a mobile home or travel trailer, that a parking permit shall be affixed or replaced and the failure, refusal or neglect of a parking permit holder to comply with this requirement, shall con-

stitute an offense and the Building Official is hereby authorized to disconnect or cause to be disconnected the available utilities in a mobil home park from such vehicle.

V. INSPECTION OF MOBILE HOME PARK

A. The inspecting authority shall make such inspection as necessary to insure compliance with the provisions of this Ordinance, semiannually, on the first day of January and the first day of July each year, or as soon thereafter as possible.

B. By the acceptance of the license, the licensee shall be deemed to authorize the inspection of a mobile home park at all reasonable hours. Such hours shall usually be during normal working hours and failure to permit such inspection shall be a ground for suspension and/or revocation of the license. Where there is reason to believe a violation may exist before or after the hours of normal inspection, the Building Official may authorize special inspections at any time; provided, however, nothing herein shall prohibit inspection for valid parking permits at any time.

C. Failure or refusal of a mobile home park occupant to permit inspection by the inspecting authority, or to permit the licensee to make necessary repairs or alterations in compliance with the requirements of the inspecting authority shall constitute a ground for disconnection of the utilities serving such mobile home. The mobile home occupant shall have the right to appeal any decision, order or action of the Building Official or the inspecting

authority by following the same procedure provided for appeals from license denials, suspensions or revocations by the Building Official.

VI. WRITTEN NOTICES OF VIOLATIONS TO BE CUMULATIVE OF PENAL PROVISIONS

A. The inspecting authority may issue written notice of violations to the licensee or his agent, or to any owner or operator for a mobile home park operating without a license during the first year from the effective date of this Ordinance, or to any mobile home park occupant, setting out the particular violation and setting out a time for making the necessary correction or repair.

B. The person receiving such a notice shall have the right of appeal from license denials, suspensions or revocations by the Building Official.

C. The provision for written notices shall be cumulative of the penal provisions hereinafter provided and the issuance of a written notice shall not prevent the filing of a criminal charge for violation of the provisions of this Ordinance.

VII. APPEALS FROM DECISIONS OF BUILDING OFFICIAL, ETC.

A. Any person whose application for a license has been denied by the Building Official, shall have the right to appeal such decision to the Board of Aldermen, by mailing postpaid or delivering to the Village Secretary, City Hall, Brookside Village, Texas, written notice of appeal within ten (10) days after he has been notified of such denial.

B. The Building Official shall have authority to suspend or revoke licenses or to order utility disconnections for the following violations of the provisions of this Ordinance:

1. A license may be suspended for any period of time up to six (6) months for a violation affecting the health, safety or welfare of occupants of a mobile home or of other persons or property.

2. A license may be revoked for a violation which is dangerous to life.

3. For a violation of the provisions of this Ordinance not deemed to require a license suspension or revocation, the utility connection servicing any stand or stands, or any structure in a mobile home park, may be disconnected or caused to be disconnected, provided a utility disconnection may be ordered in connection with a license suspension or revocation as to all or any part of a mobile home park if necessary to protect life or property.

C. After the period of suspension, a suspended license will be reinstated by the Building Official upon a showing or ability and willingness by the licensee to comply with the provisions of this Ordinance

D. A person whose license has been revoked, may apply for a new license six (6) months after such revocation by making a new application and paying the required fee therefor. Before granting such new license, the Building Official shall require the applicant to show ability and willingness to comply with the provisions of this Ordinance.

E. No sale, transfer or assignment of a revoked license or of a license during the period of suspension will be recognized by the Village, provided a person whose license has been suspended or revoked, may sell, transfer or assign his interest in the premises, if any, to another person who may then make application for a license to operate the mobile home park. If it is shown by the applicant that he has had no responsible connection with the mobile home park, he will be eligible for the granting of a new license and if a new license is granted, the new licensee may commence to operate the mobile home park upon issuance of the license.

F. Where a person whose license has been suspended or revoked, has no interest in the premises other than by agreement with the owner or owners of the premises, such person may advise the Village in writing of his withdrawal from any further connection with the mobile home park. In this event, and if it be shown that the owner or owners had no responsible connection with the actual operation and maintenance of the mobile home park, a new application may be made by any person other than the person whose license was suspended or revoked and if the new license is granted, the new licensee may commence to operate the mobile home park upon issuance of the license.

G. **Appeals:**

1. Any license revocation or suspension, or any order for a utility disconnection, or any decision, order or action taken by the Building Official may be appealed by any person affectd by

the decision, order or action to the Board by filing written notice of appeal within ten (10) days from the date of notice of such action, by mailing postpaid or delivering such notice to the Village Secretary, Brookside Village, Texas.

2. Upon written appeal as described in VII. G. 1, has been made within ten (10) days, a license suspension or revocation, or any decision or action by the Building Official, will be held in abeyance and such person will be given a hearing before the Board, provided any utility disconnection shall not be reconnected unless authorized by the Board after hearing.

VIII. MOBILE HOME REVIEW BOARD

A. The Board of Aldermen is hereby designated to be the Mobile Homes Review Board.

B. The Fire Marshal, Electrical Inspector and the Chief Building Inspector are designated as exofficio members.

C. Appeals to the Board shall be set for hearing within fifteen (15) days from the date notice of appeal was received by the Chairman, whenever possible. Such hearings may be continued from time to time until completed, but a final decision shall be made within thirty (30) days from the date notice of appeal was received by the Chairman, unless by consent or request of the person appealing, a hearing is set for or continued beyond such thirty (30) day period.

D. The Board shall have authority to affirm, modify or reverse the decision of or action of the Building

Official. The Building Official, a licensee, or any person who appeals a decision or action of the Building Official, may appeal a decision or action of the Board to the Village Council by mailing postpaid or delivering to the Village Secretary written notice of appeal address to the Mayor and the Village Council, City Hall, Brookside Village, Texas, within ten (10) days after he has been notified of the decision of the Board.

E. A license suspension, revocation, utility disconnection order, or other decision or action of the Building Official, which has been upheld by the Board, shall be immediately effective, subject however, to the right of the person affected thereby, to appeal to the Village Council as provided above. The decision of the Village Council on any appeals from the Board to the Village Council, shall be final.

IX. ENVIRONMENTAL, OPEN SPACE AND ACCESS REQUIREMENTS

A. *General Requirements:* Condition of soil, ground water level, drainage and topography shall not create hazards to the property or the health or safety of the occupants. The site shall not be exposed to objectionable adverse influences and no portion subject to unpredictable and/or sudden flooding, subsidence or erosion shall be used for any purpose which would expose persons or property to hazards.

B. *Soil and Ground Cover Requirements:* Exposed ground surfaces in all parts of every mobile home park shall be paved, or covered with stone screen-

ings, or other solid material, or protected with a vegetative growth that is capable of preventing soil erosion and of eliminating objectionable dust.

C. *Site Drainage Requirements:* The ground surface in all parts of every mobile home park shall be graded and equipped to drain all surface water in a safe, efficient manner.

D. *Park Areas for Non-resident uses*

1. Mobile homes shall be separated from each other and from other buildings and structures by at least ten (10) feet on the sides and end-to-end clearance of ten (10) feet.

2. Nothing contained in this section shall be deemed to prohibit the sale of a mobile home located on a mobile home stand and connected to the utilities.

E. *Required Separation between mobile homes in mobile home parks*

1 Mobile homes shall be separated from each other and from other buildings and structures by at least ten (10) feet on the sides and end-to-end clearance of ten (10) feet.

2. An accessory structure which has a horizontal area exceeding twenty-five (25) square feet, is attached to a mobile home or located within ten (10) feet of its window, and has an opaque top or roof that is higher than the nearest window, shall, for purposes of all separation requirements, be considered to be part of the mobile home.

F. *Required recreation areas.*

1. In all parks accommodating or designed to accommodate twenty-five (25) or more mobile homes, there shall be not less than one (1) recreation area which shall be easily accessible to all park residents.

2. The size of such recreation areas shall be based upon a minimum of 200 square feet for each mobile home stand. No outdoor recreation area shall contain less than 2,500 square feet.

3. All mobile home parks shall provide screening such as fences or natural growth along the property boundary line separating the park and adjacent land.

4. The minimum lot size shall be forty (40) feet by seventy-five (75) feet.

G. *Required Lot size, setbacks, ruffer strips and screening in mobile home parks.*

1. All mobile homes shall be located at least twenty-five (25) feet from any boundary line abutting upon a public street or highway and at least five (5) feet from interior property boundary lines.

2. There shall be a minimum distance of ten (10) feet between individual mobile homes and four (4) feet from adjoining pavement of a park street, or common parking area, or other common areas.

3. All mobile home parks shall provide screening such as fences or natural growth along the property boundary line separating the park and adjacent land.

4. The minimum lot size shall be forty (40) feet by seventy-five (75) feet.

H. *Park street system.*

1. **General Requirements:** All mobile home parks shall be provided with safe and convenient vehicular access from abutting public streets or roads to the internal parking area or mobile home stand. Alignment and gradient shall be properly adapted to topography.

2. **Access:** Access to mobile home parks shall be designed to minimize congestion and hazards at the entrance or exit and allow free movement of traffic on adjacent streets. The entrance road connecting the park streets with the public streets or roads shall have a minimum road pavement width of 34 feet, where parking is permitted on both sides, or a minimum road pavement width of twenty-seven (27) feet where parking is limited to one side. Where the primary entrance road is more than 100 feet long and does not provide access to abutting mobile home lots within such distance, the minimum road pavement width may be 24 feet, provided parking is prohibited at both sides.

3. **Internal Streets:** Surfaced roadways shall be of adequate width to accommodate anticipated traffic, and in any case shall meet the following minimum requirements:

a. All streets, except minor streets, shall be not less than 24 feet in width.

b. Minor streets, when parking is prohibited,

shall not be less than 20 feet in width. Such a street will be acceptable only if it is less than 500 feet long and serves fewer than 25 mobile homes, provided, such street may exceedd 500 feet if it is a one-way street and provides access to abutting mobile home sites on one side only.

c. Dead-end streets shall not exceed 1,000 feet in length. Such street shall be provided with a turn-around at the closed end and having an outside roadway diameter of at least 75 feet.

4. **Required Illumination of Park Street Systems:** All mobile homes shall be furnished with lighting units so spaced and equipped with luminaries placed at such mounting heights as will provide the following average maintained levels of illumination for the safe movement of pedestrians and vehicles at night:

a. All parts of the park street system shall average 0.6 foot-candles and no part shall have less than 0.1 foot-candles.

b. Potentially hazardous locations, such as major street intersections and steps or stepped ramps shall be individually illuminated and shall have a minimum of 0.3 foot-candles.

5. **Street Construction and Design Standards**

a. **Pavement:** All streets shall be paved and well drained under normal use and weather conditions. Pavement edges shall be protected to prevent raveling of the wearing surface and shifting of the pavement base. Street sur-

faces shall be maintained free of dust, cracks, holes and other hazards.

b. **Grades:** Grades of all streets shall be sufficient to insure adequate surface drainage, but shall be not more than eight (8%) percent. Short runs with a maximum grade of twelve (12%) percent may be permitted, provided traffic safety is assured by appropriate paving, adequate leveling areas and avoidance of lateral curves.

c. **Intersections:** Within 100 feet of an intersection, streets shall be approximately right angles. A distance of at least 150 feet shall be maintained between center lines of offset intersecting streets. Intersections of more than two(2) streets at one (1) Point shall be avoided.

d. **Minimum standards for paving streets** is six-inch (6") cement, limestone or stabilized shell sealed and topped with one-and-one-half inch asphalt.

I. *Required Off-Street Parking Areas*

1. Off-street parking areas shall be provided in all mobile home parks for the use of park occupants and guests. Such areas shall be furnished at the rate of not less than two (2) spaces for each mobile home stand, each space to be accessible without moving another car.

2. Required car parking spaces shall be so located as to provide convenient access to the mobile home, but shall not exceed a distance of forty

(40) feet from the mobile home that it is intended to serve.

J. *Walks*

1. *General Requirements:* All parks shall be provided with safe, convenient all-season pedestrian access walks of adequate width for the intended use, constructed of durable material (asphalt, concrete, or other masonary construction approved by the Building Official), and convenient to maintain, and such walk shall be placed between individual mobile homes, the park streets and all community facilities provided for park residents. Sudden changes in alignment and gradient shall be avoided. Shell walk are unacceptable.

2. *Common Walk System:* A common walk system shall be provided and maintained between locations where pedestrian traffic is concentrated. Such common walks shall have a minimum of three (3) feet, and meet the requirements of J. 1. above.

3. *Individual Walks:* All mobile home stands shall be connected by individual walks to a common walk, or paved street, or to a paved driveway or parking space which is connected to a paved street. Such individual walks shall have a minimum width of two (2) feet and otherwise meet to requirements of J. I. above.

K. *Mobile Home Stands*

1. The area of the mobile home stand shall be improved to provide en adequate foundation for

the placement and tie-down of the mobile home, thereby securing the superstructure against uplift, sliding, rotation and overturning.

2. The mobile home stand shall not heave, shift or settle unevenly under the weight of the mobile home due to inadequate drainage, vibration or other forces acting on the superstructure.

3. Mobile home stands shall be constructed of reinforced concrete and plan shall be subject to approval of the Village Engineer.

X. WATER SUPPLY

A. *General Requirements*

1. An accessible, adequate, safe, and potable supply of water shall be provided in each mobile home park. Where a public supply of water of satisfactory quantity, quality, and pressure is available, connection shall be made thereto and its supply used exclusively.

2. When a satisfactory public water supply is not available, a private water supply system may be developed and used as approved by the Village.

B. *Source of Supply*

1. The water supply shall be capable of supplying a minimum of 150 gallons per day per mobile home.

2. Every well or suction line of the water supply system shall be located and constructed in such a manner that neither underground nor surface contamination will reach the water supply from

any source. The following minimum distances between wells and various sources of contamination shall be required:

Contamination Source	Well or Suction Line
Building Sewer	50 feet
Septic Tank	50 feet
Disposal Field	100 feet

3. No well casings, pumping machinery or suction pipes shall be placed in any pit, room or space extending below ground level nor in any room or space above ground which is walled in or otherwise enclosed, unless such rooms, whether above or below ground, have free drainage by gravity to the surface of the ground.

4. The treatment of a private water supply shall be in accordance with applicable laws and regulations.

C. *Water Storage Facilities*

1. All water storage reservoirs shall be covered, watertight and constructed of impervious material. Overflows and vents of such reservoirs shall be effectively screened. Manholes shall be constructed with overlapping covers, so as to prevent the entrance of contaminated material.

2. Reservoir overflow pipes shall discharge through an acceptable air gap.

D. *Water Distribution System*

1. The water supply system of a mobile home park

shall be connected by pipes or other approved material to all mobile homes, buildings, and other facilities requiring water.

2. All water piping, fixtures and other equipment shall be constructed and maintained in accordance with the requirements of the Building Code and shall be of a type and in a location approved by the inspecting authority.

3. The water piping system shall not be connected with nonpotable or questionable water supplies and shall be protected against the hazards of backflow, back siphonage or cross connection.

4. The system shall be so designed and maintained as to provide a pressure of not less than twenty (20) pounds per square inch, under normal operating conditions at service buildings and other locations requiring potable water supply.

5. The system shall be a looped system in order to better maintain water pressure.

E. *Individual Water-Riser Pipes and Connections*

1. The individual water riser pipes shall be located within the confined area of the mobile home stand at a point where the water connection will approximate a vertical position.

Water riser pipes shall extend at least four (4) inches above ground elevation. The pipe shall be not less than three-quarter inch in diameter. The water outlet shall be capped when a mobile home does not occupy the stand.

3. Adequate provision shall be made to prevent freezing service lines. Valves and riser pipes shall be protected from heaving and/or thawing actions of the ground. Surface drainage shall be diverted from the location of the riser pipe.

4. A shut-off valve shall be provided near the water riser on each mobile home stand.

5. Underground stop waste valves shall not be installed on any water service.

F. *Fire Plugs* - Fire plugs shall be placed on at least six (6) inch lines and all mobile home stands must be within 400 feet of the nearest plug, if a public water supply system is available. This requirement shall not apply if a private water system services said park, or if a public water supply source is not available.

XI. SEWAGE DISPOSAL

A. *General* - An adequate and safe sewerage system, shall be provided in mobile home parks. Such system shall be designed, constructed and maintained in accordance with Village ordinances and the Village of Brookside Building Code. All sewer lines shall be connected to the Village of Brookside sewer lines, if such sewer lines are availablle.

B. *Sewer Lines* - All sewer lines shall be located in trenches of sufficient depth to be free of breakage from traffic or other movements and shall be separated from the park water supply system at a safe distance as provided by State law and ordinance of the Village. Sewers shall be at a grade which will insure adequate flow as provided in the

Building Code. All sewer lines shall be constructed of approved materials, shall be adequately vented, and shall have watertight joints.

C. *Individual Sewer Connections*

1. Each mobile home stand shall be provided with at least one four-inch diameter sewer riser pipe. The sewer riser pipe shall be so located on each stand that the sewer connection to the mobile home drain outlet will approximate a vertical position. Each mobile home stand shall be provided with a four-inch P-trap for the mobile home sewer connection and be properly vented.

2. The sewer connection shall have an inside diameter not less than three (3) inches, and the slope of any portion thereof shall be at least one-fourth inch per foot. The sewer connection shall consist of one (1) pipe line only without any branch fittings. All joints shall be watertight.

3. All materials used for sewer connections shall be semi-rigid, corrosive resistant, non-absorbent and durable. The inner surface shall be smooth.

4. Provision shall be made for capping the sewer riser pipe when a mobile home does not occupy the lot. Surface drainage shall be diverted away from the riser. The rim of the riser pipe shall extend at least four (4) inches above ground elevation.

5. Sewer lines laid on Village easements of right-of-way shall conform to all Village codes and ordinances.

D. *Sewerage Treatment and/or Discharge*

1. Where the sewer lines of a mobile home park are not connected to a public sewer, all proposed sewage disposal facilities shall be approved by the inspecting authority prior to construction.

2. Effluents from sewage treatment facilities shall not be discharged into any waters of the State except in compliance with the applicable law.

XII. ELECTRICAL DISTRIBUTION SYSTEM

A. *General Requirements* - Each park shall contain an electrical wiring system consisting of wiring, fixtures, equipment and appurtenances which shall be installed and maintained in accordance with the Building Code and the National Electrical Code governing such systems.

B. *Individual Electrical Connections*

1. Each mobile home stand shall be provided with an approved disconnecting device and overcurrent protective equipment. The minimum service per outlet shall be 120/240 volts AC, 50 amperes. A minimum of 50 amperes per mobile home stand shall be used for calculating the main service.

2. Outlet receptacles at each mobile home stand shall be located not more than 25 feet from the overcurrent protective devices in the mobile home and a three-pole four-wire grounding type

shall be used. Receptacles shall be of weather-proof construction and configurations shall be in accordance with American Standard Outlet Receptacle C-73.

3. The mobile home shall be connected to the outlet receptacle by an approved type of flexible cable with connectors and a male attachment plug.

4. Where the connected load of the mobile home is more than fifty (50) amperes either a second outlet receptacle shall be installed or electrical service shall be provided by means of permanently installed conductors. Except that a single providing more than fifty (50) amperes may be used subject to the express approval of the electrical inspector who will ascertain the safety and capability of the receptacle.

5. All exposed noncurrent carrying metal parts of mobile homes and all other equipment shall be grounded by means of an approved grounding conductor with branch circuit conductors or other approved method of grounded metallic wiring. The neutral conductor shall not be used as an equipment ground for mobile homes or other equipment.

C. *Structural Requirements for Buildings*

1. A permanent type management office shall be constructed at each licensed mobile home park. Construction standards for this office shall comply with the Village of Brookside Building Code. All other permanent type structures, except building housing sanitary facilities, shall be at the option of the licensee.

2. All portions of a structure shall be properly protected from damage by ordinary uses and by decay, corrosion, termites, and other destructive elements. Exterior exposed portions of such materials shall be constructed and protected as to prevent entrance or penetration of moisture and weather.

3. All rooms containing sanitary or laundry facilities shall have:

   a. Sound resistant walls extending to the ceiling between male and female sanitary facilities. Walls and partitions around showers, bathtubs, lavatories and other plumbing fixtures shall be constructed of dense, nonabsorbent, waterproof material or covered with moisture resistant material.

   b. At least one (1) window or skylight facing directly to the outdoors. The minimum aggregate gross area of windows for each required room shall be not less than ten percent (10%) of the floor area served by them.

   c. At least one (1) window which can be easily opened, or a mechanical device which will adequately ventilate the room.

4. Toilets shall be located in separate compartments equipped with self-closing doors. Shower stalls shall be of the individual type. The rooms shall be screened to prevent direct view of the interior when the exterior doors are open.

XIII. SERVICE BUILDING AND OTHER COMMUNITY SERVICE FACILITIES

A. The requirements of this section shall apply to service buildings recreation buildings and other community service facilities when constructed.

1. Management ofices, repair shops and storage areas.
2. Sanitary facilities.
3. Laundry facilities
4. Indoor recreation areas.
5. Commercial uses supply goods or services for the exclusive use of park occupants.

B. Mobile home parks shall have not less than one (1) flush toilet and one (1) lavatory for men and one (1) flush toilet and one (1) lavatory for women. The building or buildings containing such community sanitary facilities shall be accessible to all mobile homes.

1. Illumination levels shall be maintained as follows:
   a. General seeing tasks - five (5) footcandles.
   b. Laundry room work area - forty (40) footcandles.
   c. Toilet room, in front of mirrors - forty (40) footcandles.

2. Hot and cold water shall be furnished to every lavatory, sink, bathtub, shower and laundry fixture, and cold water shall be furnished to every water closet and urinal.

C. Barbacue Pits, Fireplaces, Stoves and Incinerators

1. Cooking shelters, barbacue pits, fireplaces, wood-burning stoves and incinerators shall be

so located, constructed, maintained and used as to minimize fire hazards and smoke nuisance both on the property on which used and on neighboring property.

2. No open fire shall be permitted except in facilities provided. No open fire shall be left unattended. No fuel shall be used and no material burned which emits dense smoke or objectionable odors.

XIV. REFUSE HANDLING

The storage, collection and disposal of refuse in the mobile home parks shall be so conducted as to create no health hazards, rodent harborage, insect breeding areas, accident or fire hazards or air pollution (see Village Ordinances for specific requirements).

XV. FUEL SUPPLY AND STORAGE

A. *Natural Gas System*

1. Natural gas piping systems shall be installed and maintained in accordance with the Building Code and other regulations governing such systems.

2. Each mobile home stand provided with piped gas shall have an approved manual shut-off valve installed upstream of the gas outlet. The outlet shall be equipped with an approved cap to prevent accidental discharge of gas when the outlet is not in use.

B. *Liquefied Petroleum Gas Systems*

1. Liquefied petroleum gas systems shall be in-

stalled and maintained in accordance with applicable laws, ordinances and regulations governing such systems.

2. Bulk storage and distribution system plans shall be submitted to the Fire Marshal for approval.

C. *Fuel Oil Supply Systems*

1. All fuel oil supply systems shall be installed and maintained in accordance with applicable laws, ordinances and regulations governing such systems.

2. Storage tanks located in areas subject to traffic shall be protected against physical damage.

XVI. FIRE PROTECTION

A. Mobile home parks shall be kept free of litter, rubbish and other flammable materials.

B. Portable fire extinguishers of a type approved by the Fire Marshal shall be kept in service buildings and all other locations designated by the Fire Marshal or fire inspectors and such extinguisher shall be maintained in good operating condition.

C. Fires shall be made only in stoves, incinerators and other equipment intended for such purposes.

D. Fire hydrants shall be located within 400 feet of any mobile home service building or other structure in the park, on line not less than six (6) inches. Fire hydrant locations shall be determined by the Fire Marshal.

XVII. MISCELLANEOUS PARK REQUIREMENTS

A. *Responsibilities of the Mobile Home Park Licensee*

1. The person to whom a license for a mobile home park has been issued shall be responible for operation of such park in compliance with the provisions of this chapter and he shall provide adequate supervision to maintain such park, its facilities and equipment in good repair and in a clean and sanitary condition.

2. The licensee shall be responsible for notifying park occupants of the applicable provisions of this Ordinance.

3. The licensee shall be responsible for supervising the placement of mobile homes on mobile home stands within the mobile home park. The licensee shall be responsible for maintaining a register containing the names of all park occupants. Such register shall be available to any authorized person inspecting the park for the enforcement of this Ordinance, or any other ordinances of the Village of Brookside.

B. *Responsibilities of Park Occupants*

1. Mobile home park occupants shall comply with all applicable provisions of this Ordinance and such occupant shall maintain his mobile home, mobile home stand, mobile home site and appurtenances and equipment in good repair and in a clean and sanitary condition.

2. The mobile home park occupant shall be responsible for the proper placement of his

mobile home on the mobile home stand and for proper installation of all utility connections.

C. A mobile home shall not be occupied for dwelling purposes unless it is properly placed on a mobile home stand and connected to water, sewerage, and electrical utilities, and other services where required for health and safety of the occupants.

XVIII. PARKING OF MOBILE HOMES OUTSIDE OF LICENSED MOBILE HOME PARK

A. No mobile home shall be parked in violation of any enforceable deed restriction or covenant.

B. A mobile home may be parked on a vacant lot, or plot, outside a mobile home subdivision as defined in "DEFINITIONS" (and no other), provided the lot, or plot has 9,000 square feet of land. The mobile home shall set back a minimum of 25 feet from any public street right-of-way line and seven and one-half (7-1/2) feet from any side or back lot line, or in accordance with subdivision deed restrictions.

C. Not more than one (1) mobile home shall be parked on a vacant lot or plot without first obtaining a mobile home park license. Such lot or plot shall contain a minimum of 9,000 square feet. Any mobile home placed on such a lot, or plot, shall meet the minimum standards for plumbing, heating, and electrical systems outlined or referred to in this Ordinance.

D. A mobile home may be parked adjacent to a residence, or place of business, provided a spacing of ten (10) feet from the nearest building, on the

same property, is maintained and seven and one-half (7-1/2) feet from any interior property lines, or not less than twenty-five (25) feet set-back from a street. Not more than one (1) mobile home shall be parked on the same lot, or plot, with a residence, or commercial building, without first obtaining a mobile home park license. No mobile home shall be parked adjacent to a residence or place of business, where such placement would create a hazard to life, safety or health.

E. All occupied mobile homes located outside a mobile home park or mobile home sales park for more than 48 hours, shall be connected to all required utilities, and permits obtained from the Building Official for a foundation, driveway, plumbing and electricity.

F. Mobile homes located outside mobile home parks will be connected by separate and individual water and sewer taps to city services where such services are available.

G. Parking permit fees for single mobile homes located outside mobile home parks shall be the same as fees for mobile homes inside the mobile home parks, except that a license fee will not be required.

H. The Building Official may permit the temporary parking of a mobile home in a location outside an approved and licensed mobile home park for a period in excess of 48 hours, provided such location shall not create a health, traffic, or other hazard, and provided such mobile home shall not be occupied.

I. All mobile homes, both existing and new, and all parts thereof, shall be maintained in a safe and sanitary condition. All devices, or safeguards, which are required by this Ordinance and other regulations, pamphlets, or data made a part hereof when installed, repaired, or altered, shall be maintained in good working order. The owner or occupant, shall be responsible for the maintenance of the mobile home.

XIX. It shall be unlawful to occupy a mobile home as any type occupancy other than as a private dwelling, provided, however, a mobile home may be parked at a constructing site for use as a field office for a period not exceeding the period of construction and not more than one (1) mobile home may be used for demonstration and office at a mobile home sales park.

XX. MEANS OF EGRESS

A. Every mobile home shall be provided with at least two (2) exit doors. Such doors shall be located remote from each other. Screen doors shall be on the hinged type, opening outwardly from the inside. Escape doors suitably designed as an emergency exit-way, and releasing to the outside, may be provided as a substitute for one (1) exit door when length of the mobile will not permit use of a regular exist door.

B. Locking Mechanism, when provided on doors and screen doors, shall be of a type which permits opening from the inside by the

simple operation of a knob, or lever, or by pressure against the door or screen door.

XXI. Each mobile home must have minimum space of 200 square feet floor area, and qualify under Section I. O. herein (DEFINITIONS).

XXII. No travel trailer shall be used as nor occupied as a permanent type residence except in a mobile home park. Travel trailers so occupied shall comply with American Standard Association Pamphlet A 110.2-1963 Plumbing, Heating and Electrical Systems in Travel Trailers.

XXIII. **LIGHT AND VENTILATION**

A. No mobile home shall be used or occupied without proper light and ventilation. All habitable rooms (including rooms with combined functions) shall be provided with natural light openings by means of fixed, or openable windows, glazed doors, or openable roof, or fixed roof panels. The light opening size required in each such room shall not be less than ten percent (10%) of the floor area of the room, combined rooms, or space. **Exception:** In lieu of natural light, artificial light may be provided in kitchens, laundry rooms, and other rooms approved by the Building Official.

B. Bathrooms, toilet compartments, and kitchens may use mechanical ventilation systems in lieu of natural ventilation. The system shall have a capacity to provide a minimum of twelve (12) air changes per hour in the area occupied by such rooms. The mechanical ventilation system shall discharge to the outside air. All rooms used for

sleeping purposes shall be provided natural ventilation by means of openings in the interior walls, or roof. The natural ventilator shall have no less than four percent (4%) of the floor area of the room, combined room or space, or three (3) square feet, whichever is greater

XXIV. VIOLATIONS AND PENALTIES

A. Any person violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor, and each such person shall be deemed guilty of a separate offense for each and every day, or portion thereof, during which any violation of any of the provisions of this Ordinance is committed, continued, or permitted, and upon conviction of any such violation such person shall be punished by a fine of not more than one (1) hundred dollars (100.00)

B. All Ordinances or parts of Ordinances in conflict herewith are hereby repealed to the extent of such conflict only.

C. If any provision, section, subsection, sentence, clause or phrase of this Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void, or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected hereby, it being the intent of the Village Council in adopting this Ordinance that no portion thereof or provisions or regulation contained herein shall become inoperative or fail by reason of an unconstitutionality and all provisions of this Ordinance are declared to be reasonable.

D. The provisions of this Ordinance requiring parking permits for mobile homes in mobile home parks shall become effective on the date last shown below.

E. The Council of Brookside Village hereby finds and determines that for the purpose of protecting the health, safety and welfare of the people of the Village of Brookside Village, and particularly the people who reside in and occupy mobile home travel trailers in mobile home parks, and for the purpose of providing the inspection necessary to accomplish this, this Ordinance and the regulations, standards, and sanctions herein established, and the construction permits, mobile home park licenses, parking permits, and the fees provided therefor, are necessary to accomplish such purposes.

XXV. This Ordinance shall take effect from and after ten (10) days from its passage by the Village Council. The Village Council. The Village Secretary is hereby directed to give notice hereof, by causing the caption of this Ordinance to be published in the official newspaper of the Village of Brookside, at least twice within ten (10) days after the passage of this Ordinance.

PASSED AND APPROVED THIS 6 day of August, 1970.

/s/ Mrs. Shirley M. Zamorsky

Mayor - Brookside Village

ATTEST:

/s/ N. Zainfeld, Jr.

Village Secretary

APPENDIX C

Opinion in *Stewart v. Inhabitants of Durham*, No. 81-252 (Maine Oct. 14, 1982).

MAINE SUPREME JUDICIAL COURT
Reporter of Decisions
Decision No. 3066
Law Docket No. Law-81-252

KENNETH STEWART *et al.*

v.

INHABITANTS OF TOWN OF DURHAM *et a.*

Argued September 7, 1982
Decided October 14, 1982

Before McKUSICK, C.J., and GODFREY, NICHOLS, ROBERTS, CARTER, VIOLETTE, and WATHEN, JJ.

McKUSICK, C.J.

Defendant Town of Durham[1] appeals from an order of the Superior Court (Androscoggin County) enjoining the Town from enforcing its mobile home ordinance against the Stewarts. The Superior Court held that the ordinance, which excludes from the Town all mobile homes except those located in duly licensed mobile home parks, is unconstitutional in its entirety because of its broad "grandfather clause." In so doing, the Superior Court accepted the interpretation of that grandfather clause adopted by Durham officials. We conclude that the proper legal construction of the grandfather clause saves it and the rest of the ordinance from constitutional attack, and we therefore reverse the Superior Court's order.

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[1]The building inspector and the members of the Durham Zoning Board of Appeals also were named as defendants and now join in the Town's appeal.

In 1972, the Town of Durham adopted a comprehensive plan as a guide to the community's future development. At its annual town meeting, held on March 6, 1976, the Town adopted a mobile home ordinance. Section 6(c) of that ordinance states, "No person shall maintain and occupy a mobile home in the Town of Durham except in a duly licensed mobile home park." Section 4 of the ordinance, its grandfather clause, provides:

> The provisions of this ordinance shall not apply to occupied mobile homes lawfully existing within the Town of Durham . . . nor shall it apply to the replacement of lawfully existing mobile home.

Appellees Kenneth and Nancy Stewart own a piece of land in Durham. Their lot is not within a mobile home park. In August, 1980, they applied for a building permit to move their mobile home onto their Durham land from its location in a Brunswick mobile home park. Their application was denied by Durham's building inspector and then by the Town's zoning board of appeals. The Stewarts thereupon sought relief in the Superior Court. The evidence produced there shows that ever since its enactment, the ordinance's grandfather clause has been applied broadly by the Durham selectmen and building inspector. Specifically, those town officials have interpreted the clause to allow the owner of a mobile home lawfully in Durham before the ordinance took effect 1) to keep his home where it was, 2) to replace it with a new mobile home on the same lot, 3) to sell it, together with the lot, to a new owner, or 4) to move it to another lot in Durham, not previously the site of a mobile home (providing that the new location otherwise met the requirements for residential use).

Before the Superior Court the Stewarts argued, among other things, that Durham's mobile home ordinance is inconsistent with the Town's comprehensive plan[2] and violative of the equal protection and due process clauses of the United States and Maine Constitutions.[3] The court rejected their first argument, but held that the broadly construed grandfather clause rendered the ordinance unconstitutional, and enjoined the Town from enforcing the ordinance so as to prevent the Stewarts from moving their mobile home onto their lot in Durham. The Town has appealed the Superior Court's decision on the constitutional issue, and the Stewards have cross-appealed on the comprehensive plan question. We sustain the Town's appeal and deny the Stewart's cross-appeal.

I. CONSTRUING THE ORDINANCE

In holding that the Durham mobile home ordinance is unconstitutional because of the breadth of its grandfather clause, the Superior Court implicitly accepted the interpretation given to that clause by Durham's selectmen and building inspector. In so doing, the court made an error of law. *See LaPointe v. City of Saco*, Me., 419 A.2d 1013, 1015 (1980) (meaning of terms in a zoning ordinance is a question of law for the court). It is true that contemporaneous construction of a law by its drafters or administrators is not to be lightly disregarded by a court. *See Kelley v. Halperin*, Me., 390 A.2d 1078, 1080 (1978). However, against that traditional rule of construction we must weigh two countervailing considerations: the fact

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[2]30 M.R.S.A. § 4962(1)(A) (1978) requires that a town's zoning ordinances be "pursuant to and consistent with a comprehensive plan adopted by its legislative body."

[3]U.S. Const. amend. XIV; Me. Const. art. I, § 6-A.

that the plain language of the grandfather clause and the context in which it must be read support a narrower construction of its terms more readily than the expanded interpretation accepted by the Superior Court, and our conclusion that a narrow construction will enable us to avoid the constitutional difficulties identified below. An administrative construction of an ordinance or statute is never conclusive upon a court. *See State v. York Utitlities Co.*, 142 Me. 40, 44, 45 A.2d 634, 635-36 (1946). We decline to adopt the administrative construction put upon the grandfather clause in Durham's mobile home ordinance.

The grandfather clause exempts "occupied mobile homes lawfully existing within the Town of Durham" and the "replacement" of such homes from the requirement that mobile homes be confined to licensed mobile home parks. An "occupied mobile home" is a home actually being lived in – a home "settled" on a given piece of land, with the usual water, sewer, and electrical hookups. An "occupied mobile," in fact, is best thought of as being integrated with the lot on which it is located. Words used in a statute are to be given their plain and natural meaning whenever possible. *See Town of Arundel v. Swain*, Me., 374 A.2d 317, 320 (1977). The terms used in the Durham grandfather clause, given their plain and natural meaning, call for an interpretation significantly narrower than that accepted by the Superior Court. The wording of the clause suggests that the owner of a mobile home occupied lawfully in Durham before the ordinance took effect should be allowed to keep it, to replace it with a new mobile home on the same lot, or to transfer it, together with its lot, to a new owner (as it is the home itself, not the owner, that is "grandfathered"), but *not* to move it to another lot within Durham's borders.

Looking beyond the wording of the grandfather clause itself, we note that a narrow construction of the clause is consistent with the overall purpose of the mobile home ordinance, while the broad reading tends to undermine that purpose. Applied as the Durham officials have applied it, the clause virtually guarantees that the number of mobile homes in Durham outside mobile home parks will never drop below the number of nonconforming uses in 1976, when the ordinance was enacted. Moreover, if all of the grandfathered mobile homes could without restriction be moved about within the geographical limits of Durham, there is a potential for further erosion of property values and of the Town's aesthetic character. Those possible consequences run counter to the acknowledged goals of the ordinance as a whole,[4] to preserve the aesthetic character of Durham and to protect property values. Each section of an ordinance should be read so as to harmonize with the entire legislative scheme of which it is a part. *See Seven Islands Land Co. v. Maine Land Use Regulation Commission,* Me., ____ A.2d ____, ____ (September 17, 1982, slip op. at 6-7). Construing the grandfather clause to permit the maintenance, replacement, or sale of existing mobile homes only at their original locations in Durham best conforms to the objective of the ordinance as a whole to restrict mobile homes to mobile home parks after March 6, 1976.

We adopt this construction of the grandfather clause not only because it is the most plausible reading of the clause but also because it avoids the serious constitutional questions presented by the town officials' interpretation. "Courts must construe legislative enactments so as to avoid a danger of unconstitutionality . . . The cardinal

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[4]See the discussion in part II of this opinion.

principle of statutory construction is to save, not to destroy." *State v. Davenport*, Me., 326 A.2d 1, 5-6 (1974). *See also* 82 Am.Jur.2d, *Zoning & Planning* § 68, at 500 (1976) ("where a zoning ordinance is susceptible of two different reasonable constructions, one of which will render the ordinance valid and the other render it invalid, the court will adopt the one which renders it valid."). This principle of statutory construction is fully consistent with the general rule that the courts are to give effect to legislative intent, *see State v. Hussey*, Me., 381 A.2d 665, 666 (1978), as it cannot be assumed that the drafters of the Durham mobile home ordinance intended their product to violate the constitution. In *Clardy v. Town of Livermore*, Me., 403 A.2d 779 (1979), we interpreted a Livermore ordinance differently from the way it had been interpreted by town officials in order to avoid the decision of a constitutional question altogether. Here, we adopt a different construction in order to avoid a close constitutional question, although we cannot entirely escape a discussion of the due process and equal protection issues raised by the Stewards.

II. The Constitutional Questions

Properly construed, the grandfather clause to Durham's mobile home ordinance easily passes constitutional muster. Under the due process clauses of the federal and state constitutions, a town ordinance must "bear a reasonable relationship to the public health, safety, morals, or general welfare," and "must not be unreasonable, arbitrary, or discriminatory based upon the reasonably foreseeable future development of the community." *Warren v. Municipal Officers of Gorham*, Me., 431 A.2d 624, 627 (1981). Furthermore, according to *Warren*, aesthetic consideration, fear of deterioration in the

value of neighboring properties, and concern over an adverse impact on the town's tax base are legitimate reasons "which do properly relate to the public health, safety, morals or general welfare." 431 A.2d at 628. Those are the same three reasons that the Superior Court found were in fact Durham's proposed justifications for its mobile home ordinance.[5]

In light of the listed purposes, the grandfather clause in the Durham ordinance is not unreasonable, arbitrary, or discriminatory. Rather, it strikes a rational balance between speedy achievement of the Town's legitimate planning goals and the interest of those town residents who moved mobile homes into Durham before the ordinance was enacted. The grandfather clause,which is properly read only to allow such residents to remain in their existing mobile homes at their 1976 locations, replace them, or transfer them, preserves the bulk of the rights anticipated by such residents when they purchased their mobile homes, while ensuring that over time, by attrition, the nonconforming uses will be reduced in number. Some form of a grandfather clause is probably required to save the entire ordinance from a constitutional challenge under

[5]Witnesses in the Superior Court testified that town officials, in drafting the mobile home ordinance, were concerned about the "aesthetic contrast" between the Town's traditional older homes and the metallic, box-shaped, flat-roofed mobile homes. There was also expert testimony that the presence of mobile homes tended to depress the value of the traditional homes on nearby or adjoining lots. Finally, there was evidence that the Town's planning board took into consideration the fact that an occupied mobile home requires approximately the same level of municipal services as a site-built home while generating less tax revenue due to its lower market value.

the takings clause.[6] Thus, such a clause is not merely rationally related to the Town's goals, but is probably necessary to effect those goals, as a mobile home ordinance vulnerable to a challenge under the takings clause is of no use whatever in implementing the Town's ultimate planning scheme.

Under the equal protection clauses of the federal and state constitutions, once a legislative classification has been found not to "[trammel] fundamental personal rights" or be "drawn upon inherently suspect distinctions such as race, religion, or alienage," *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), it need only be shown to be rationally related to a legitimate public purpose.

> A classification . . . must be natural and reasonable and based upon an actual difference in the classes bearing some substantial relationship to the public purpose sought to be accomplished by the discrimination in rights and burdens. If a classification, though necessarily discriminatory, stands these tests, it is not a denial or equal protection of the laws.

Wright v. Michaud, 160 Me. 164, 171, 200 A.2d 543, 547 (1964).

No fundamental right or inherently suspect distinction is implicated by Durham's decision to grant a limited exemption from the terms of its mobile home ordinance for prior nonconforming uses. The remaining "rational relationship" test is easily met by the Durham ordinance,

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[6] U.S. Const. amend. V (applicable to the states through amend. XIV); Me. Const. art. I, § 21. A provision "for the continuance of the nonconforming use . . . is ordinarily included in zoning and police power ordinances because of hardship and [the] doubtful constitutionality of compelling immediate cessation of nonconforming uses." *Town of Windham v. Sprague*, Me., 219 A.2d 548, 550 (1966).

grandfather clause and all, for the same reasons discussed in the due process context above. The exemption for prior nonconforming uses is rationally related to the Town's aesthetic, property-value, and tax-base goals, as it saves the entire ordinance from a serious takings clause question while allowing the Town to proceed consistently towards its objective of confining mobile homes to duly licensed mobile home parks.

III. The Comprehensive Plan

The Superior Court held that Durham's mobile home ordinance, taken in its entirety, is consistent with the Town's 1972 comprehensive plan. Whether or not the requirements of 30 M.R.S.A. § 4962 apply to the ordinance in question here,[7] we have no doubt that the Superior Court's conclusion was warranted by the evidence before it. The comprehensive plan itself indicates that Durham's planning board and residents were concerned with preserving the Town's rural character and protecting the tax base — concerns overlapping considerably with those underlying the mobile home ordinance. Most significantly, the

[7]We assume without deciding that Durham's mobile home legislation is truly a "zoning" ordinance as defined by 30 M.R.S.A. § 4962(1)(H) (1978) ("the division of a municipality into districts and the prescription and reasonable application of different regulations in each district"). *But cf. Benjamin v. Houle*, Me., 431 A.2d 48 (1981) (Auburn ordinance prohibiting the removal of gravel from any land in the city characterized as "a general and uniform citywide regulation" and not a zoning ordinance at all); *Town of Boothbay v. Nat'l Advertising Co.*, Me., 347 A.2d 419 (1975) (Boothbay ordinance regulating all off-premises billboards in the town by same standard treated as an exercise of the town's police powers). It is here argued that Durham's mobile home ordinance is a zoning ordinance rather than a uniform town-wide regulation because it implicity creates a new division or zone — mobile home parks — in addition to the two zones ("rural" and "resource protection") already created by Durham's land use ordinance.

comprehensive plan specifically states, "the Planning Board approves of locating mobile homes in parks designed to be harmonoius with the general character of the Town." We would be hard pressed to conceive of any stronger evidence that the mobile home ordinance in this case is consistent with Durham's comprehensive plan.

IV. Conclusion

At oral argument, counsel for appellants Kenneth and Nancy Stewart expressly waived all claims that anything in the Durham mobile home ordinance other than its grandfather clause renders it unconstitutional. Accordingly, our decision on the two issues presented to us concludes this case in favor of the Town. The entry shall be:

Appeal sustained.

Cross-appeal denied.

Remanded to the Superior Court for entry of judgment for defendants and further proceedings consistent with the opinion herein.

APPENDIX D

Article in Austin American Statesman, Nov. 4, 1982

17 INJURED AS BIG WINDS BATTER COAST

PORT ISABEL (AP) – Residents and vacationers sorted through wreckage left by a violent storm that surprised this Texas coastal community early Wednesday, injuring at least 17 people and leaving some homeless.

"I thought the building was just going to go crashing," said Sheila Kilgore of St. Louis, who was on her first business trip to Texas when the storm hit. She said eerie sounds jolted her awake in her hotel room in nearby South Padre Island.

Winds were clocked at 84mph at Port Isabel and 81 mph on Padre Island. Five people were hospitalized and at least 12 others were inured as the winds tossed more than 12 mobile homes into a canal, uprooting palm and mesquite trees and causing some flooding.

Kilgore said she selected an island hotel while in the area on business because "everybody told me Padre Island was a nice place to stay."

After the storm, however, she moved to a hotel in Harlingen about 40 miles inland from the island.

Kilgore said she was awakened in the middle of the night by what sounded like a woman's scream.

The sound turned out to be the wind wailing through her balcony door. The hotel began to shake and the lights went out, she said.

"I thought the building was just going to come crashing down," she said. "Now that I look back on it, it seems kind of funny."

Three women and one man were admitted to Valley Community Hospital in Brownsville. The woman, who had a shoulder injury, was listed in stable condition while the men, with back injuries, were reported in guarded condition.

One man was admitted to Valley Baptist Medical Center with broken ribs. He was in fair condition.

Twelve people were treated and discharged from the two hospitals.

The sudden storm blew roofs off homes and damaged condominiums, said South Padre Island Mayor Minnie Solomonson. Recreational vehicles were destroyed or overturned and power lines brought down. Some debris-filled streets in Port Isabel were impassable and about 14 mobile homes in one park were thrown into a canal. Airplanes at area airports were also were damaged.

"We were totally unprepared because no one had issued a warning," Solomonson said. "It was just a freak."

"We have some homeless people," she said, but declined to estimate how many.

U.S. Coast Guard Chief Bill Barts, commander of the Port Isabel station, said the storm, which rolled in about 1 a.m. Wednesday, surprised the Coast Guard with its intensity.

"That's when the bottom fell out," he said.

Barts said the National Weather Service message the Coast Guard received Tuesday called for southeasterly winds at 17 to 23 mph shifting to northerly at 23 to 34 mph as the front approached.

Those winds, he said, are not unusual for a typical norther.

"That's a piece of cake down here," he said. "But we didn't know it was going to be as bad as it was."

A Coast Guard helicopter was flying over the area to assess damage and look for injured people, Barts said. A Cameron County sheriff's officer said authorities found no signs of campers reported missing after the storm and now think the campers left the area safely.

Office - Supreme Court, U.S.
FILED
OCT 27 1982
ALEXANDER L. STEVAS,

No. 82-689

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

HOMER N. COMEAU, ET. UX.,
Petitioners,

v.

CITY OF BROOKSIDE VILLAGE, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Texas

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BRIEF AMICI CURIAE OF THE NATIONAL MANUFACTURED HOUSING FEDERAL AND THE TEXAS MANUFACTURED HOUSING ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Consistent with the Fourteenth Amendment may a community adopt as its exclusive zoning ordinance a prohibition on manufactured housing except when located in mobile home parks?

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INTEREST OF AMICI CURIAE

The National Manufactured Housing Federation, 1745 Jefferson Davis Highway, Arlington, Virginia 22202, is a non-profit national trade association whose membership is composed of 37 state and regional trade associations representing and providing services for the manufactured

housing industry in such states. These state trade associations variously represent all segments of the manufactured housing industry with a combined individual membership total of approximately 30,000 business firms.

The Texas Manufactured Housing Association is a statewide membership supported trade association with approximately 1,200 business members. TMHA members represent all segments of the manufactured housing industry including manufacturers, financial institutions, insurance companies, retailers, suppliers, and manufactured housing brokers, subdivision developers and park owners. THMA filed a brief amicus curiae in the Texas Supreme Court in the instant case and its President testified at trial as an expert witness.

ARGUMENT

Even the most casual television viewer is now familiar with the plight of the would-be home owner in the United States as the network news each month reports the average cost of new housing as well as the interest rate on conventional mortgages. Although the stories seldom attempt any depth, the message comes through pretty well: it takes a lot more money than most Americans ever will have to get into the housing market.

The picture is indeed stark. The average price of a new single family home in 1980 was $76,300. "Homeseekers are being priced out of the market in larger and larger numbers. While in 1970 almost half of all American families could afford the median priced, single-family new home, today less than one-quarter can." HUD, The Affordable Community: Growth, Change, and Choice in the 80s, 8 (July 1981). This cannot sit well in a society where home ownership has been justly prized as an important aspect of our lives. From the earliest days of our nation, individuals have wanted land and a home to call their own. Not only have we succeeded in providing this,

but over "much of the past four decades, the nation has made steady and substantial progress toward the goal of adequate shelter for all Americans . . . . Today, the American dream of owning one's own home is a reality for two of every three households, compared with fewer than half in 1940." The Report of the President's Commission on Housing 59 (1982).

Households are formed by young adults under the age of 35, and as we all know the postwar baby boom has created a huge cohort at that age group. A study prepared for the President's Commission on Housing by the Joint Center for Urban Studies of Harvard and MIT concluded that the rate of housing formation will remain high throughout the 1980s. Yet "[a]s a result of inflation and high interest rates, home ownership has become increasingly difficult to achieve for those who are not already owners. First-time homebuyers face large downpayments and high monthly cash costs. . . ." The Report of the President's Commission on Housing 59. Indeed, carrying costs on new homes have soared to over 60% of monthly income. *Id.* at xxv [Table].

As the President's Commission and others have noted, manufactured housing[1] has become "a significant source of affordable housing for American families, particularly first-time homebuyers, the elderly, and low- and moderate-income families." *Id.* at 85. In 1980, 29% of all single-family homes sold in the United States were manufactured homes (*id.* at 203); a year later, this had increased to 36%. The vast majority of these homes were sold for under $50,000. *Id.* at 85. If home ownership is to become a reality for the millions of households to be formed during this decade, manufactured housing will become increasingly important in the housing market.

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[1] The term "mobile home" was changed to "manufactured home" by P.L. 96-399, 94 Stat. 1641 (1980), 42 U.S.C.A. §§ 5401 *et seq.*

It is here that need collides with reality. After noting that affordable manufactured housing provides an important means of providing adequate housing for Americans, the HUD study notes:

> Images of 'trailor camps' and 'aluminum ghettos' are often raised to keep factory-built housing out of 'good' neighborhoods. The trailor camp image does not take into account the great improvements made by the manufactured housing industry in the past decades. Housing coming off assembly lines compares favorably in looks, livability, and durability with conventional housing. When these units are sensitively sited and landscaped, little but price distinguishes them from other housing. Almost all local and state regulations, however, discriminate against manufactured housing.[2] These discriminatory policies cause communities to ignore and forego a promising opportunity to narrow the gap between the supply and demand of affordable housing.

HUD, The Affordable Community 56. So, too, The Report of the President's Commission on Housing recognizes the discrimination against manufactured housing based on the outmoded stereotypes of decades passed by (at 203). Yet as the President's Commission notes, not only do those living in a community have a stake in how property is regulated, in our mobile society all citizens, including those who wish to move into a community, have "a stake in the opportunity to move in and out of communities without artificial restrictions." *Id.* at 178.

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[2] See also Note, *Toward an Equitable and Workable Program of Mobile Home Taxation*, 71 Yale L.J. 701, 702 (1962): "Community fear of blight can traced to the low quality of both the early trailers and their parking facilities . . . [The early structures had] no construction standards to insure even minimum protection against fire or collapse . . . [Mobile home] parks seldom exceeded minimum health and sanitation standards. The specter of such parks teeming with tiny trailers made community apprehension understandable."

The instant case provides a snapshot of the national problem. But there are significant differences. The most important facet of this case is that Brookside Village has *no* comprehensive zoning plan. The exclusive land use control in this small Texas community is the prohibition under challenge that manufactured homes must be exclusively located in "mobile home parks". Thus this case does not present any issues relating to a requirement that municipalities fine-tune their zoning ordinances as national needs change. Instead, it presents the pure legal issue of whether a city may single out manufactured housing—and manufactured housing alone—for zoning restrictions.

As difficult as it is to conceive, any property owner in Brookside Village may construct, on site, *any* type of building so long as it meets safety standards. The building may be large; it may be small. It may be an aesthetic beauty; it may be a monstrosity. It may be a mansion; it may be a shack. It can even be a commercial establishment or a large tasteless apartment complex. The City of Brookside Village does not care. It can be on the smallest lot in the city; it can be on a multi-acre tract. Anything can be built on site. But if the building is manufactured to be secured on a permanent foundation, then Brookside Village cares. It prohibits this; manufactured housing cannot be used as a single-family residence. It must be located, along with other manufactured housing in a "mobile home park". This is so no matter how safe it is, how large it is, how attractive it is. Brookside Village does not care about much, but when it cares, it cares a lot.

If a real property owner in Brookside Village wishes to live in manufactured housing, the city offers him three and only three choices: (1) he may leave Brookside Village and live elsewhere; (2) he may stay in Brookside Village, open his property as a "mobile home park", comply with all the requirements surrounding a "mobile home

park" in Brookside Ordinance No. 58[3] and become a landlord, or (3) he may leave his property and rent from another, with others, in a "mobile home park".

Like most other Americans, Homer and Hazel Comeau wanted to be neither landlords nor tenants. They simply wanted to live in a home on their own property. In July of 1978 the Comeaus petitioned Brookside Village to be allowed to place a manufactured home on their property. In August, the city refused the request. About a month later the Comeaus moved a manufactured home onto their four acres of property. The home in question consists of 3 bedrooms and 2 bathrooms and has 1780 square feet. Thus it is 80 square feet larger than the average single-family dwelling constructed in 1978. See Report of the President's Commission on Housing 71. Like the average home, the Comeaus meet all construction, building and safety standards applicable. Furthermore, again like the average home, it is affixed to a permanent foundation. What is different from the average home is that the Comeaus' cost only $35,000.

This litigation then ensued. The Comeaus attacked Brookside's Ordinance 58 (as amended by Ordinance 78) as violative of the Equal Protection and Due Process Clauses of both the State and Federal Constitutions.[4] The city responded that the ordinances were valid because of potential water and sewage problems, and that manufactured homes are vulnerable to wind and fire damage, and may decrease property values in a community. Brook-

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[3] Ordinance No. 58 consists of 22 legal-sized, single-spaced typed pages of regulations of "mobile home parks". Ordinance 78, an amendment to Ordinance 58, prohibits locating a mobile home as a residence outside the confines of a "mobile home park." Ordinance 78 is reproduced as Appendix A *infra*.

[4] See Count VI of the Plaintiff's Original Petition, reproduced as Appendix B *infra*.

side Vilage prevailed at trial, lost in the Court of Civil Appeals, and then prevailed again in the Texas Supreme Court. The due process argument was rejected because municipalities have historically had the power to deal with problems caused by mobile homes[5] and the rationales offered by the city were "not clearly arbitrary and unreasonable". The equal protection argument was rejected "[b]ecause all mobile home owners, desiring to use their structures as residences, are treated alike".

Unlike some academics who have pronounced the Equal Protection Clause a dead letter, the Texas Supreme Court would inter the clause by tautological reasoning. Unlike both, we believe the Equal Protection Clause continues to exist and properly places some outer limit on the ability of state and local governments to classify identical things differently. We also believe that the Texas Supreme Court erred when it concluded that arbitrary laws still satisfy the requirement of due process and do so until they become "clearly arbitrary". Although we believe that the ordinances transgress even the "clearly arbitrary" standard articulated below, it is our contention that the ordinances' requirement that owners of real property desiring to live in manufactured housing must either leave Brookside Village or become landlords or tenants is so arbitrary that it runs afoul of even *de minimis* rationality which is less than *Village of Euclid* v. *Ambler Realty*, 272 U.S. 365 (1926) requires. Furthermore, once Brookside Village begins to articulate the rationale for the ordinances, their underinclusiveness becomes so dominating and their true purpose so patent, that they deny equal protection.

The principal justification for the city's action has been the water and sewage problem. The Court of Civil

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[5] The Texas Supreme Court and Brookside Village have studiously avoided the term "manufactured housing". Contrast the Federal Government, footnote 1 *supra*.

Appeals easily exploded this justification by pointing out that the water problems caused by the Comeaus' manufactured home are no different whatsoever than those that would be caused by legal on-site construction. Although the city again pressed its water and sewage argument to the Supreme Court, that court simply noted the argument was made, and then steered clear of it in the opinion.

The next asserted justification for the ordinances are fire and wind safety considerations. The Comeaus offered expert testimony that manufactured homes, such as theirs, constructed after, and in compliance with, the National Manufactured Housing Construction and Safety Standards Act of 1974, 41 U.S.C.A. §§ 5401 *et seq.* (Supp. 1982) were just as safe as conventional on-site housing. The undisputed evidence was that mobile homes constructed according to the HUD code since June 15, 1976 are required to be securely anchored to withstand gale or hurricane-force wind velocity for the particular geographic location of the home. The city also offered no evidence to counter the findings of the National Fire Protection Association that there is no difference in the incidence or extent of loss between HUD code manufactured homes and site-built residences.

The Texas Supreme Court appears to have relied on the fire and wind rationale for the ordinances, although the treatment of this issue is sparse and ambiguous. Without adverting to any evidence, the court says manufactured housing is "vulnerable to windstorm and fire damage". That is true, but does not distinguish manufactured housing from on-site housing which is also vulnerable to fire and wind. It is possible that the court means "more" vulnerable, although if this is its meaning, it flies in the face of the undisputed evidence and raises the expertness of five aldermen in a small Texas community to a level which is unchallengeable even by people who have the relevant facts. To the extent the

court is holding that a municipality has a complete right to enforce its ordinances affecting the use of real property in the face of clear evidence that the asserted justifications do not exist, the decision, as well as the ordinances, denies individuals the use of their property without due process of law.

Another—and related—reading of this two paragraph treatment of the fire and wind rationale is that the court agreed with the Comeaus but did not believe that there was any obligation on the city to change its dated approach. Although the facts might lead a city to update its approach, "the fact remains that a large number of mobile homes, manufactured prior to the 1976 construction and safety standards acts, exist". This implies that the municipality may discriminate against post-1976 homes for which there are no differences with site-built homes because there are differences between site-built homes and some pre-1976 manufactured homes. This stands as an admission that there is no relevant distinction between the Comeaus' manufactured home and a site-built home, but that the city is free adversely to regulate the former anyway.

The final rationale offered and accepted by the Texas Supreme Court is that the "mobile nature [of the homes] may lead to transience and detrimentally impact property values if scattered throughout a community". The Comeaus' house, which is affixed to a permanent foundation, is no more "mobile" than a site-built house. True, it could be unaffixed. But we have all seen site-built houses unaffixed. And the moving costs for each are high and similar. Transience applies to the mobile home of decades past, not the manufactured homes of today.[6]

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[6] Possibly with an exception. Brookside Village may be creating a self-fulfilling prophesy. By refusing to allow manufactured homes on owner-controlled real property, the city created an underclass of tenants subject to a landlord's domination. This may force mobility on the tenants.

The property value argument might have validity in some contexts. But not in Brookside Village. Once again it is necessary to recall the counter-intuitive fact that Brookside Village has no general zoning. The city does not like manufactured homes, but it does not care about anything else. A shack, a commercial establishment, a tacky apartment complex can be constructed with impunity in Brookside Village. Each can lower property values and the city does not care. It stretches credulity to suggest that only manufactured housing is capable of lowering property values sufficiently in Brookside Village that it, alone, merits attention.

In *Moore v. East Cleveland*, 431 U.S. 494 (1978) this Court invalidated an effort by middle class blacks to isolate their community from the matrifocal structure of ghetto black families. Although unconstitutional, the prejudice behind the ordinance was at least comprehensible. Here, by contrast, the ordinances at issue reflect prejudice without purpose. Creating a mobile home ghetto made sense thirty years ago when mobile homes were small, poorly constructed eye-sores. But Brookside Village cannot even make a land use argument since the creating of "mobile home parks" in Brookside Village is the sole zoning ordinance. And it is the failure of generality that brings the facts into context. Brookside Village is not even marginally underinclusive in its concerns. The city asserted a water problem, but a manufactured home such as Comeaus' presents no water problem different from a site-built home. And if one were to take the city's argument at face value—as the Court of Civil Appeals did to the city's dismay—then congregating manufactured houses in a park, which the Comeaus could do on their property, exacerbates the water problem. So another rationale was needed. Manufactured homes are just not safe enough, the city announces. Unfortunately post-1976 manufactured housing is. So the city is left with contending that it need not take these newer facts into consideration. It can con-

clusively presume all manufactured housing is less safe because it knows that some older mobile homes are not as safe as site-built homes. This relieves the city of any obligation to explain why two homes identical in every aspect except place of construction may be treated differently. Finally, there is the argument that manufactured housing depresses property values. Again, this might have validity were there some indication that Brookside Village had any concern with property values. But its lack of a zoning ordinance hardly speaks for preserving property values, and the ability of the Comeaus, should they desire, to become landlords of a "mobile home park" on their four acres belies the city's argument. In the end, the requirement that people with manufactured homes should either leave Brookside Village or congregate together in parks has no legitimate rationale and its real purpose is manifest. The city fathers learned in their youth that mobile homes were bad and they see no need to correct this judgment just because the facts have changed. The mayor's testimony that he would burn any manufactured home located on land adjoining his[7] sums it up: good people don't live in manufactured housing, and accordingly, people who do live in manufactured housing may be denied the enjoyments of home-owning on their own land.

The underinclusiveness is so extreme and the justifications so baseless that the ordinance denies equal protection even under the most minimal standard. But more fundamentally, the arbitrariness of Brookside Village's treatment of landowners wishing to affix a manufactured home to a permanent foundation on their own property for their own use denies them due process of law.

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[7] The Mayor's testimony on this point is reproduced as Appendix C *infra*.

CONCLUSION

The petition for certiorari in the instant case reflects the justifiable anger of an owner of real property who is told he must either leave or become a landlord or a tenant. The petition fairly rings with a clarion call for this Court to move into a new area and make a lot of new law. In that respect it is not overly helpful. The instant case provides an opportunity to examine a single egregious use of a not untypical form of exclusionary zoning as it relates to the growing national problem of how we are to house the post-war baby boom generation. Because the City of Brookside Village has but a single zoning ordinance, the case presents a pure legal issue and is a superior vehicle for appellate review. Furthermore, unlike the applications in the petition, settled doctrines of equal protection and due process can be applied to these facts for decision. One need not scour Professor Tribe's Treatise; reading again *Village of Euclid v. Ambler Realty* will suffice nicely. What is at stake is simple *de minimis* rationality: may a municipality have a single zoning ordinance that creates a closed class sustained by the sole purpose of venting the prejudices of years gone by? It comports better with our concept of liberty to think the answer is no, and the writ of certiorari should be granted to reaffirm an old verity in a newer context.

Respectfully submitted,

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APPENDICES

APPENDIX A

ORDINANCE NO. 78

AN ORDINANCE AMENDING ORDINANCE NO. 58; REGULATING THE PARKING OF MOBILE HOMES; REGULATING THE CHANGE OR REPLACEMENT OF MOBILE HOMES; PROVIDING FOR EMERGENCY USE OF MOBILE HOMES; REQUIRING PERMITS FOR SUCH EMERGENCY USE; PROVIDING FOR A PENALTY FOR VIOLATION HEREOF; AND PROVIDING FOR AN EFFECTIVE DATE HEREOF.

BE IT ORDAINED by the Board of Aldermen of Brookside Village, Texas;

Section I. Subsections B and C of Section XVIII of Ordinance No. 58 is hereby deleted in its entirety, and is hereby amended to include the following provisions as set out herein.

Section II. Parking of mobile homes, camper buses, motor homes and camper trailers, for use as a residence, outside of a mobile home park shall be prohibited.

Section III. Mobile homes heretofore installed in compliance with the Ordinances of Brookside Village may remain in place, and continue to be used or occupied. Exchange, replacement, alteration, relocation or additions to mobile homes within Brookside Village is hereby prohibited, unless such move, replacement, alteration, relocation or addition is to or in a licensed mobile home park.

Section IV. The Board of Aldermen of Brookside Village, by a majority vote of its five (5) members, may grant to individuals the temporary use of mobile home, motor homes, camper busses, or camper trailers in the event of an emergency. An emergency shall only be loss of a permanent dwelling due to fire, flood or any other natural disaster. In the event any such application for

emergency temporary use of said mobile homes, motor homes, camper buses or camper trailers is granted by the Board of Aldermen, no such temporary use shall begin until:

A. A permit fee, to be established by the Board of Aldermen, is paid by the applicant.

B. A determination of the period of time such emergency use may continue, but in no event shall such period exceed thirty (30) days. However, each applicant may have his emergency permit extended for additional thirty (30) day periods. No permit shall be extended, or renewed, more than five (5) times. All such extensions shall require a majority vote of the five (5) member Board of Aldermen.

C. The Board of Aldermen shall only grant an emergency permit for the express purpose of occupying a mobile home, motor home, camper bus or camper trailer as a residence, only while repairing, remodeling or replacing a permanent residence.

D. Any such emergency permit granted shall require the applicant to locate his temporary mobile home, motor home, camper bus or camper trailer upon the same lot, or parcel of real estate, as the permanent residence that is being repaired, remodeled or replaced.

Section VI. An existing mobile home, that is destroyed by fire, explosion, flood, or other natural disaster, may be replaced, if such replacement is of the same size, length, width and weight as the one destroyed.

Section V. This Ordinance shall become effective from and after the date of its passage, and after all applicable laws of the State of Texas, if any, have been complied with.

Section VI. Any person violating this Ordinance is guilty of a misdemeanor, and upon conviction shall be fined not less than Ten Dollars ($10.00) and not more than One Hundred Dollars ($100.00). Each day a violation of this Ordinance continues shall be a separate offense.

Passed and approved this 18 day of April, 1974.

[The error in section numbering is in the original ordinance.]

APPENDIX B

Count VI of Plaintiff's Original Petition for Temporary Restraining Order, Temporary Injunction and Other Relief:

All provisions of said Ordinances, as they relate to the placement of a manufactured home on Plaintiffs' property, are unconstitutional as applied to Plaintiffs' above described property, in that it arbitrarily and capriciously attempts to dictate the use to which Plaintiffs can place on their land as a home. The Federal and State governments have, as set forth hereinabove, pre-empted the health, safety and welfare with regard to regulation of the construction and installation of the mobile homes. Said restricting provisions of said Ordinances, and enforcement of said Ordinance by the officers and agents of said City of Brookside Village is a void and unconstitutional use of the police powers given it by the United States Constitution and the State of Texas Constitution in that it cannot be shown that the public health, safety, moral or welfare of the citizens of this City or State can be furthered by the enforcement of this Ordinance. As such, the action of the City violates the Equal Protection and Due Process clauses of both State and Federal Constitutions.

APPENDIX C

Testimony of the Mayor of Brookside Village on the Comeaus' Home Taken from the Statement of Facts [Trial Transcript] at 42-43:

Q. So it's possible that he [Comeau] could have five or ten mobile homes at that site, and being inside the ordinance there wouldn't be any problem, correct?

A. Yes, if the permit was issued by the council for a mobile home park.

Q. But at present he couldn't place his one mobile home on there and under the same requirements that are made for on-site houses use that as his residence, could he?

A. That's correct. He can't use a mobile home for a residence.

Q. A couple of more things. Mr. Boehm, you were quoted in the paper as saying that the ordinance is meant to keep mobile homes, which the town regards as fire traps and health dangers because of inadequate sewage, from being set up near conventional homes. Is that basically the way you feel about it?

A. I don't remember the exact statement but I'd say basically.

Q. Just to verify that you said this, also from the City of Brookside paper . . .

A. No, sir, it was not the City of Brookside paper.

Q. Pearland?

A. Yeah, it was probably in the *Journal* or in *The News* from Friendswood.

Q. (Reading:)

> "Boehm said that he thinks Comeau's home is nice looking, but he's concerned about the damage to the ordinance that would be done if Comeau were permitted to keep the home. 'If they try to move a

mobile home next to my house,' Boehm said, 'well they'd better not because I'll burn it down and you can quote me on that.' "

Is that a fair statement?

A. Pretty fair.